

POLITICS AND CIVIL PROCEDURE RULEMAKING: REFLECTIONS ON EXPERIENCE

PAUL D. CARRINGTON[†]

ABSTRACT

This Article is a reflection on personal experience as well as an account of what has happened to the Federal Rules of Civil Procedure in the most recent quarter century. It observes that the Supreme Court of the United States has assigned to itself a role in making procedural law inconsistent with the Rules Enabling Act of 1934 or any more-recent utterance of Congress. This procedural law made by the Court is responsive to the desire of business interests to weaken the ability of citizens to enforce laws enacted to protect them from business misconduct. The Article concludes with the suggestion that Congress should now act to constrain the role of the Court and restore the ability of citizens to enforce their rights in civil proceedings in federal courts.

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[†] Professor of Law, Duke University; Reporter, Advisory Committee on Civil Rules, Judicial Conference of the United States, 1985–92. This Article was written for presentation to the 2010 Civil Litigation Review Conference held at Duke University School of Law by the Judicial Conference of the United States on May 10–11, 2010. Stephen Burbank, Dan Coquillette, Scott Dodson, George Liebmann, Daniel Meador, Dickson Phillips, Thomas Rowe, Steve Subrin, Judith Resnik, Gerald Tjoflat, and Michael Zimmerman contributed numerous helpful comments and suggestions. Special thanks to Jennifer Behrens for help with the documentation.

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I. INTRODUCTION: A FIRST-PERSON PERSPECTIVE

This Article protests the lack of respect shown by the Supreme Court of the United States for the political process devised in 1934 by all three branches of the federal government to better suit rules of civil procedure to the protection and enforcement of legal rights in civil proceedings. Under that 1934 law,¹ the Court has a specific but limited role in rulemaking. Congress also has a role. So do the Judicial Conference of the United States (Judicial Conference), and, at least indirectly, the Executive Branch. And so does the Federal Judicial Center, established in 1967 to provide empirical data informing rulemakers about the consequences of the rules for which they share responsibility. But in recent decades, the Supreme Court has manifested dissatisfaction with its modest share of the power to make procedural law and has in its opinions proclaimed new rules having no basis in texts enacted through the established rulemaking process or in any empirical data.

1. Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2006)).

The new procedural law made by the Court manifests political objectives and gives special meaning to the term “judicial activism.” Its creation weakens the enforcement of public laws by private citizens. It thus conforms to the deregulation or tort-reform politics favored by many business interests.

As a sometime participant in the traditional rulemaking process, I seek in this Article to place the Court’s ventures in historical and political perspective. If, as I contend, the Federal Rules of Civil Procedure (Civil Rules) should still be made by the process established in 1934 and now conducted by the Judicial Conference, it is imperative that Congress communicate to the Supreme Court its disapproval of the Court’s freewheeling rewriting of the Civil Rules. And the Senate might usefully place the issue on the agenda for Supreme Court nomination hearings.

To advance this contention, I must first disclose my personal role in the events recorded here. I was quite surprised in 1985 to get a call from Chief Justice Burger offering me an appointment as Reporter to the Advisory Committee on the Civil Rules (Advisory Committee). I probably owed that call to the influence of Professor Maurice Rosenberg, my sometime coconspirator in law reform and sometime coauthor.² Professor Rosenberg tended to overrate my modest skill as a politician. And he was at the time an academic member of the Advisory Committee and was thus surely consulted by the Chief Justice in the selection of a new Reporter. The Chief was probably looking for political talent to help address the rising political stress on procedural rulemaking that had become a serious concern beginning in the 1970s.³

That stress would continue through my tenure and beyond, evolving into the crisis that procedural rulemaking now faces in 2010 as a result of the Court’s interventions.⁴ During my time on the staff

2. Professor Rosenberg was the chair of the Advisory Council on Appellate Justice, 1971–1975 (funded by the Federal Judicial Center and Law Enforcement Assistance Administration) of which I was a member. We were coauthors of a book with Daniel J. Meador, PAUL D. CARRINGTON, DANIEL J. MEADOR & MAURICE ROSENBERG, *JUSTICE ON APPEAL* (1976), and I authored an obituary saluting his memory, Paul D. Carrington, *Maurice Rosenberg*, 95 COLUM. L. REV. 1901 (1995).

3. For a contemporaneous assessment of the political challenges facing the Supreme Court in the rulemaking process, see generally Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975).

4. For a compact account of the destabilizing impact of the revised pleading standard on the civil litigation system, see generally Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010).

of the rulemakers, I participated in numerous controversies. I briefly recount these controversies in this Article to illuminate the rulemaking process with which Supreme Court Justices have increasingly manifested discontent.

II. THE STATE OF FEDERAL LAW IN 1985

A. *Federal Judicial Dockets*

One cause for rising political concern radiating through the federal judiciary in 1985 was the very substantial increase in the federal caseload over the preceding two decades.⁵ That increase had numerous causes.⁶ One was the growth of the criminal docket resulting from numerous extensions of federal criminal law.⁷ Larger criminal dockets stemmed in part from the then–newly proclaimed War on Drugs⁸ and in part from the enhancement of the procedural rights of the accused—most notably the advent of the right to counsel—resulting in more contested cases.⁹ Another cause was the substantial increase in the number of civil actions filed by citizens seeking enforcement of civil rights or civil liberties, especially those filed by prisoners attacking their convictions or invoking the newly established rights of citizens in prison.¹⁰ Other new categories of civil

5. The number of civil cases pending in district courts in 1965 was 74,395. WARREN OLNEY III, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS FOR THE FISCAL YEAR ENDED JUNE 30, 1965, at 88 (1965). The comparable number in 1985 was 254,114. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 276 (1985).

6. For contemporaneous accounts of the many sources of the caseload increase, see RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 59–93 (1985); Wolf Heydebrand & Carroll Seron, *The Rising Demand for Court Services: A Structural Explanation of the Caseload of U.S. District Courts*, 11 JUST. SYS. J. 303, 313–20 (1986).

7. There were 31,569 criminal cases filed in 1965, OLNEY, *supra* note 5, at 88, and 10,834 cases pending, *id.* at 89. There were 38,245 criminal cases filed in 1985, ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 5, at 336, and 22,229 cases pending, *id.* at 337.

8. The literature on this war is abundant. For an account of the War on Drugs attentive to its impact on the courts, see generally JAMES P. GRAY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS* (2001).

9. See SHELDON KRANTZ ET AL., *THE RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF ARGERSINGER V. HAMLIN* 1 (1976) (noting that recognizing the right to counsel “placed significant new burdens on the criminal justice system”).

10. See generally DAVID RUDOVSKY, *THE RIGHTS OF PRISONERS: THE BASIC ACLU GUIDE TO A PRISONER’S RIGHTS* 21–22, 26–27 (1973) (summarizing the legal rights of prisoners at disciplinary hearings and to notice of rules governing prisoner conduct).

filings included employment discrimination cases¹¹ and cases brought to enforce federal environmental laws.¹² State supreme courts' extensions of their states' tort law to deter needless risk-taking by manufacturers and other business firms¹³ may also have contributed new diversity cases to federal court dockets. And there were perhaps more contract disputes between business firms engaged in interstate or international commerce.

The Supreme Court's 1977 decision establishing the right of lawyers to advertise their services may also have magnified the caseloads in state and federal courts.¹⁴ And the advent of electronic information storage perhaps began to elevate the relative cost of discovery in some big commercial cases in the 1980s.¹⁵

Most of these docket developments were linked to President Lyndon Johnson's search for the Great Society,¹⁶ a search that might have been better and more moderately labeled a search for a Middle Class Society. Great Society politics were a continuation of Progressive and New Deal politics, which had long aimed to increase and enforce the rights of citizens by providing equal protection to all.¹⁷ These politics were, at least in part, a continuing reaction against

11. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 115–17 (2009). For information about the disfavor that these cases have come to arouse among federal appellate judges, see *id.* at 112–15.

12. See generally JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 77–79 (3d ed. 2010) (“Every major federal environmental law passed since 1970 . . . has contained a citizen suit provision.”).

13. Instrumental in extensions of tort law were WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (1st ed. 1941), and published opinions of the California Chief Justice Roger Traynor. BEN FIELD, ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR, at xiv, 105–06 (2003).

14. *Bates v. State Bar*, 433 U.S. 350, 379 (1977). For an account of the extension of the right to advertise, see 1 RODNEY A. SMOLLA, LAW OF LAWYER ADVERTISING 85–110 (2006). For a compact assessment of the consequences of the decision, see generally Geoffrey C. Hazard, Jr., *Advertising and Intermediaries in Provision of Legal Services: Bates in Retrospect and Prospect*, 37 ARIZ. ST. L.J. 307 (2005).

15. See Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 564–65 (2001) (discussing the impact of computer technology on litigation and the new and unforeseen costs and burdens of electronic discovery).

16. For a full account of the Great Society, see generally THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM (Sidney M. Milkis & Jerome M. Mileur eds., 2005).

17. Multiple commentators have provided accounts of political developments prior to the Great Society. See, e.g., MAXWELL BLOOMFIELD, PEACEFUL REVOLUTION: CONSTITUTIONAL CHANGE AND AMERICAN CULTURE FROM PROGRESSIVISM TO THE NEW DEAL (2000); MAUREEN A. FLANAGAN, AMERICA REFORMED: PROGRESSIVES AND PROGRESSIVISMS 1890–

the Industrial Revolution–inspired anarchism and Marxism that flourished in America during the economic crisis of the 1930s.¹⁸ And they generally had the support of a vibrant labor movement.

B. The Relation of 1985 Dockets to the 1934 Act and Private Enforcement of Public Law

The Great Society–inspired increases to federal court caseloads were not entirely coincidental to the vision of civil procedure embodied in the 1934 Rules Act.¹⁹ The aim of that reform, first vigorously advanced in the United States at the federal level by the early-twentieth-century Progressives, was to enforce all the legal rights of citizens, whether derived from legislation or from state and federal constitutions.²⁰ The Progressives, in turn, drew their ideas from thoughts being expressed throughout the nineteenth century²¹ and perhaps from earlier thoughts attributed to the Protestant

1920 (2007); WILL MORRISEY, *THE DILEMMA OF PROGRESSIVISM: HOW ROOSEVELT, TAFT, AND WILSON RESHAPED THE AMERICAN REGIME OF SELF-GOVERNMENT* (2009).

18. See generally PAUL AVRICH, *ANARCHIST VOICES: AN ORAL HISTORY OF ANARCHISM IN AMERICA* (1995) (compiling oral histories of anarchists in the United States); COMMUNISM IN AMERICA: A HISTORY IN DOCUMENTS (Albert Fried ed., 1997) (compiling a broad range of documents on the history of American Communism); ALONZO VAN DEUSEN, *RATIONAL COMMUNISM: THE PRESENT AND FUTURE REPUBLIC OF NORTH AMERICA* (New York, Soc. Sci. Publ'g Co. 1885) (defending communism against its critics and articulating a vision of a communist society).

19. Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2006)).

20. The evolution of the politics of twentieth-century law reform can be traced back to the natural rights movement. See generally JUSTICE: A READER (Michael J. Sandel ed., 2007) (compiling classic and modern readings on human rights and philosophy); THE PHILOSOPHY OF HUMAN RIGHTS (Patrick Hayden ed., 2001) (same). From there, progressivism and populism played a critical role in American political development. See generally ROBERT WYNESS MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* (1952) (surveying the historical progression of procedural rules in English and American courts); WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937* (1994) (chronicling the impact on judicial behavior of the judicial-reform efforts between 1890 and 1937). For a more-focused discussion of the relation between the Progressives' vision of reform and the Rules Enabling Act, see EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 28–33 (2000); Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: I. The Background*, 44 YALE L.J. 387 (1935).

21. See J. Newton Fiero, *Report of Committee on Uniformity of Procedure and Comparative Law*, 19 A.B.A. ANN. REP. 411, 436–38 (1896) (“[A]uthorizing judges . . . to select . . . lawyers familiar with the procedure in this and other countries . . . [to draft simplified procedural rules] will give an opportunity for a close, careful and painstaking investigation into the methods of procedure . . . [used] throughout the English speaking world . . .”).

Enlightenment, which emphasized the role of the individual celebrant.²² In the twentieth century, Progressive ambitions gained the vigorous support of the newly well-organized legal profession.

The American idea of engaging judges in the crafting of procedural law had a nineteenth-century English origin.²³ In the twentieth century, the American Bar Association (ABA) took up the cause and secured the passage of the Rules Enabling Act of 1934,²⁴ which granted the judicial branch authority to craft procedural rules.²⁵ The aims of those who wrote the 1934 statute and of the Advisory Committee that wrote the 1938 Federal Rules of Civil Procedure²⁶ were expressed in Rule 1: “to secure the just, speedy, and inexpensive determination of every action.”²⁷ The rules were, at last, to facilitate the assertion of civil claims and assure that meritorious claims based on discoverable facts were promptly recognized and enforced. The right to discover evidence would become a key feature transforming federal courts into effective instruments of public civil law enforcement.²⁸

The 1938 Civil Rules were the product of a committee of eminent lawyers led by Homer Cummings, the attorney general of the United States, and served by Charles Clark of the Yale Law School.

22. For recent accounts of the significance of seventeenth- and eighteenth-century Protestant thought, see WAYNE HUDSON, *ENLIGHTENMENT AND MODERNITY: THE ENGLISH DEISTS AND REFORM* (2009) (making a revisionist argument for the significance of the English deists in the Protestant Enlightenment); KIERON O'HARA, *THE ENLIGHTENMENT: A BEGINNER'S GUIDE* (2010) (describing the history and ideas of the Enlightenment and their impact).

23. See SAMUEL ROSENBAUM, *THE RULE-MAKING AUTHORITY IN THE ENGLISH SUPREME COURT* 1–6 (1917).

24. Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2006)).

25. See generally Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6 (1959) (eulogizing Edson Sutherland and his role in shaping the Civil Rules on the Supreme Court's Advisory Committee); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) (examining the triumph of equity rules over the common law and its implications for contemporary civil procedure).

26. For a brief but illuminating account of the beginnings of the Civil Rules, see CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 426–32 (5th ed. 1994).

27. FED. R. CIV. P. 1. For suggested reform to this rule, see Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287 (2010).

28. See Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 535–37 (2001); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 739–40 (1998).

The committee solicited public comment, which enabled it to see the diverse ramifications of proposed texts. This political process had several virtues: transparency, disinterest, access to advice and empirical data, and a measure of accountability to all three branches of government.²⁹ The Supreme Court has explicitly acknowledged these merits twice in recent times,³⁰ but the present Justices seem, at least at times,³¹ to have overlooked them.

To the extent that the Progressive reformers achieved their aims, private citizens gained the ability to enforce many diverse laws enacted or proclaimed to protect public interests as well as their own. In recognition of that reality, by the 1960s, the United States was moving away from the New Deal reliance on administrative agencies to protect the public interest from harms caused by risky business practices.³² Related to this evolution was the growing awareness that government agencies assigned to protect the public from harms caused by the indifference or greed of business interests have a tendency, over time, to be captured by the very interests they were organized to regulate.³³ Citizens represented by their own private lawyers are generally less vulnerable to such capture than are public officials. This sometimes-costly scheme of business regulation is imposed ex post. Business decisionmakers without administrative oversight are freer to take risks in search of profits but are more exposed to adverse consequences than if they were regulated ex ante

29. On the subsequent evolution of the process, see Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 181–92 (1988).

30. See *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998) (“[Q]uestions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.”); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (“[Changes to the rules] must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.”).

31. See *infra* Part VIII.

32. For a definitive essay on public law litigation, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). I have made this point about the shift to enforcing laws through the courts more elaborately in Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 933–44 (1996). Chayes’s essay may be seen as a reflection of legal process theory and the thinking of Lon Fuller and others critical of the cynicism of legal realism. For a critique of legal realism written contemporaneously with the Rules Enabling Act, see L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934). For a modern elaboration, see Robert G. Bone, *Lon Fuller’s Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273 (1995).

33. James Landis penned a striking assessment of the capture problem. See JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (1960).

by public officers. A nation that often eschews the idea of strong or intrusive government may require this form of business regulation to constrain harmful business practices.

For these reasons and perhaps others,³⁴ both states and the federal government embraced civil litigation conducted pursuant to the Civil Rules as envisioned in the 1930s.³⁵ By the 1960s, this form of litigation had become in many minds a preferred form of regulating business in the public interest. This sense of public purpose led the Judicial Conference to propose and secure the creation of the Federal Judicial Center in 1967,³⁶ in the hope that the data it might gather would inform rulemakers and result in procedural rules becoming more efficient instruments for the enforcement of public laws and citizens' legal rights. This improved enforcement would, the Judicial Conference hoped, modify businesses' behavior, making our social order more just.³⁷

C. *The Deregulation Movement*

A countervailing political force arose to resist this form of privatized business regulation. That force finds its roots in Adam Smith's eighteenth-century celebration of the free market as a source

34. Others may attribute the development to the influence of "rent-seeking" lawyers, issue-group interests, budget constraints, or party politics. See Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821, 826–28 (2008).

35. See John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 383 (2003) (concluding that the trend toward greater state conformity with the Civil Rules had reversed itself); John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1427 (1986) (noting that the rules of civil procedure in twenty-three of fifty-one jurisdictions were replicas of the Federal Rules of Civil Procedure, and a substantial majority of jurisdictions used a system at least substantially similar to the federal rules).

36. See 28 U.S.C. §§ 620–629 (2006) (establishing the Federal Judicial Center). For a history of the Center, see Denise L. Arial, *History of the Federal Judiciary: The Federal Judicial Center*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/landmark_18.html (last visited Oct. 23, 2010).

37. Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 938–40 (1975) (describing the "Behavior Modification Model" as a way of imposing costs on individuals to alter behavioral choices). See generally Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 J.L. & HUM. BEHAV. 121 (1982) (critiquing the dispute resolution model of adjudication and describing the importance of structural reform litigation focusing on large organizations). Professor Terence Halliday observed that Max Weber had celebrated this American impulse to rationalize legal institutions as the essence of Western culture. TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT* 23–26 (1987).

of public good³⁸ and has sometimes been led by lawyers whose careers are invested in representing business interests.³⁹ Advocates of deregulation often discount the many risks to distant others that result from business practices extended over substantial distances. But as Adam Smith himself observed,⁴⁰ business decisionmakers are disinclined to bear costs to diminish risks to distant workers, consumers, investors, passengers, patients, franchisees, tenants, or others.

Deregulation became the battle cry of business interests such as those represented by the United States Chamber of Commerce.⁴¹ One form of deregulation politics challenged the procedural reforms that enabled private citizens to enforce diverse claims—and coincidentally to enforce sundry public laws. Advocates of this kind of deregulation urged that the costs and delays of excessive litigation were disabling American businesses from competing in the global economy that our nation aspired to enlarge.⁴² The available data on the growth in the

38. See generally ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (R.H. Campbell, A.S. Skinner & W.B. Todd eds., Clarendon Press reprint, 1979) (1776) (advocating an economic system of natural liberty).

39. See Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 1000 (2000).

40. See ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 135–37 (D.D. Raphael & A.L. Macfie eds., Liberty Classics 1982) (1759) (recounting the relative indifference of his Glasgow neighbors to distant tragedies); see also DOĞAN GÖÇMEN, *THE ADAM SMITH PROBLEM: RECONCILING HUMAN NATURE AND SOCIETY IN THE THEORY OF MORAL SENTIMENTS AND THE WEALTH OF NATIONS* (2007) (examining the contrasting conception of human nature in Adam Smith's two most noted works).

41. See generally IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992) (elaborating on the interconnectedness of regulation and free markets); M.E. BEESLEY, *PRIVATIZATION, REGULATION AND DEREGULATION* (1997) (providing a collection of essays on the economic effects of privatization and regulation); *DEREGULATION OR RE-REGULATION? REGULATORY REFORM IN EUROPE AND THE UNITED STATES* (Giandomenico Majone ed., 1990) (assessing developments in regulation in Europe and America, exploring the implications of European Community regulation, and analyzing the political economy of regulation); WILLIS EMMONS, *THE EVOLVING BARGAIN: STRATEGIC IMPLICATIONS OF DEREGULATION AND PRIVATIZATION* (2000) (describing how new forms of regulation can come with market reforms); ALAN SHIPMAN, *THE MARKET REVOLUTION AND ITS LIMITS: A PRICE FOR EVERYTHING* (1999) (analyzing the free market worldwide after the "Market Revolution" and discussing the continuing existence of regulation); DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD* (1998) (describing the shift toward more open markets).

42. Stephen J. Carroll provides a contemporaneous assessment of the ways the American liability system limits U.S. competition abroad. See STEPHEN J. CARROLL WITH NICHOLAS PACE, *ASSESSING THE EFFECTS OF TORT REFORM* 35–36 (1987); see also GUSTAVE H.

civil dockets of the federal courts, however, substantially weakened the argument: there was remarkable growth in the number of cases, but much of the growth was in prisoner complaints and other pro se cases.⁴³ In Judge Jack Weinstein's words, the business community's stated concerns about case overload were a "weapon of perception, not substance."⁴⁴

Nevertheless sensitive to business complaints, Chief Justice Burger in 1976 had called for a national conference in his hometown of St. Paul to honor Roscoe Pound, a law reformer in his time. Pound's address to the ABA at that place in 1906⁴⁵ had invigorated the political efforts of the ABA that had resulted in the 1934 Rules Enabling Act.⁴⁶ Although the conference's primary consequence was to stimulate the alternative dispute resolution (ADR) movement,⁴⁷ there was a shared sense that 1979 was a time to consider more reform. Chief Justice Burger had by then reduced the number of

SHUBERT, SOME OBSERVATIONS ON THE NEED FOR TORT REFORM 11 (1986) (describing various problems with the civil justice system including the disadvantages of vacillation between a purely compensatory system and a fault-based liability system); LOUIS HARRIS & ASSOCS., PUBLIC ATTITUDES TOWARD THE CIVIL JUSTICE SYSTEM AND TORT LAW REFORM 3 (1987) (providing a survey showing that Americans think the civil justice system is overused and the problem is growing).

43. See Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 17 (1986) (explaining that "five categories of cases—recovery of overpayments, social security cases, prisoner petitions, torts, and civil rights cases—account for almost three-quarters of the entire increase in filings"); see also Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 989–90 (2003) (arguing that the growth in number of cases was due, in part, to the provision of legal services to those previously unable to obtain representation).

44. Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1909 (1989).

45. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 14 AM. LAW. 445 (1906); see also Barry Friedman, *Popular Dissatisfaction with the Administration of Justice: A Retrospective (and a Look Ahead)*, 82 IND. L.J. 1193, 1193 (2007) (providing a retrospective analysis of Pound's speech).

46. See THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 289–94 (A. Leo Levin & Russell R. Wheeler eds., 1979) (describing the short-term and long-term effects of Pound's speech). See generally William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277 (1978) (summarizing Pound's recommendations and noting the work done to respond to his concerns).

47. In 2006, the International Academy of Mediators awarded Frank Sander a medal for his efforts beginning at that conference. *Awards*, INT'L ACAD. OF MEDIATORS, <http://www.iamed.org/awards.cfm> (last visited Oct. 25, 2010). See generally Michael L. Moffitt, *Before the Big Bang: The Making of an ADR Pioneer*, 22 NEGOTIATION J. 437, 437–39 (2006) (providing a brief biography of Frank Sander).

lawyers and professors engaged in civil rulemaking so that the Advisory Committee was dominated by the judges that he selected.⁴⁸

Champions of the deregulation cause acquired substantial control of the federal government in the elections of 1980.⁴⁹ And in the era following those elections, business interests recognizing the political role of the judiciary and seeking deregulation secured appointment of a controlling majority of Supreme Court Justices and federal judges.⁵⁰ Especially after the appointments of Chief Justice John Roberts and Justice Samuel Alito by President George W. Bush, the Court's work has evidenced a probusiness shift that seems to have magnified the Court's demonstrated inclination to weaken private enforcement of public laws regulating business.⁵¹

D. The Cost of Law Enforcement: Discovery

Cost is, of course, an ancient grievance against law.⁵² But business interests' complaints were often directed specifically at the costs associated with the discovery process that was the central, distinguishing feature of civil procedure under the 1938 Civil Rules.⁵³

48. See Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1714–15 (2004) (explaining Chief Justice Warren Burger's impact on the selection of Advisory Committee members).

49. See ANDREW E. BUSCH, *REAGAN'S VICTORY: THE PRESIDENTIAL ELECTION OF 1980 AND THE RISE OF THE RIGHT* 98–144 (2005) (detailing the general election of 1980); MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* 245–68 (1995) (providing an illuminating account of the relation of the deregulation movement to American populism).

50. See CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* 127–28 (2006) (describing a conservative move in the Supreme Court after 1980 but showing the challenges of documenting that trend in lower federal courts).

51. See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1531–32 (2008) (elaborating on the probusiness nature of a majority of Supreme Court cases during the October Term of 2006); see also A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 353 (2010) (employing the less-aggressive term “restrictive ethos” to denote the Court's transformative political aims).

52. Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, in 3 LECTURES ON LEGAL TOPICS 87, 89 (1926) (“[I]n the third millennium before Christ men were complaining about the inefficiency of legal procedure, and I fancy that if any of you are destined in the year 7000 A.D. to revisit . . . you will be obliged to report . . . that mankind still exhibits the same discontentment with its methods of adjusting human differences . . .”).

53. See FED. R. CIV. P. 26–37; cf. GEORGE RAGLAND, *DISCOVERY BEFORE TRIAL* (1932) (discussing professional experiences of administering discovery in pretrial procedure). See generally Subrin, *supra* note 28 (giving the historical context of the 1938 Civil Rules concerning discovery). For background on the development of practice under these rules, see generally

These discovery rules had enabled many citizens and firms to conduct private investigations of business practices threatening harm to consumers, passengers, tenants, workers, patients, or franchisees. As Judge Weinstein observed, the motives of many of those seeking reform of discovery practice were primarily substantive rather than procedural: they sought economic advancement, perhaps especially their own, if at the cost of decreasing civil justice.⁵⁴ Some critics believed that business interests were concerned more with the reality that defendants were losing cases because facts were exposed by partisan discovery than with the costs of discovery in the cases that defendants were winning. Perhaps most unwelcome to business interests was the cost of complying with laws that private plaintiffs, armed with the right to investigate facts in dispute, were enforcing.

It bears notice that the alleged costly overuse of discovery might also have been related to the entrenchment, in the third quarter of the twentieth century, of business litigators' practice of billing for their services by the hour. This practice created a strong incentive in big-stakes cases for lawyers to leave no discovery stone unturned.⁵⁵ Another factor in rising costs was the increasing use of expert testimony, which had the secondary effect of engaging more of lawyers' time in studying subjects of expertise and examining prospective witnesses and their data.⁵⁶ By 1980, the available data indicated that the problem of excessive use of discovery was—though sometimes severe—largely a feature of big commercial cases in which lawyers were billing heavily for their time. Abuse was less likely in

WILLIAM A. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* (1968) (detailing the debate over whether discovery rules have improved the adversary system).

54. Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827, 828–29 (1993) (“The procedural reforms of the 1930s would have been only of passing interest had they not been accompanied and followed by the vast expansion of federal substantive law that resulted from the . . . growth and liberalization of the common law in areas such as torts and contracts.”).

55. See generally WILLIAM G. ROSS, *THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS* (1996) (discussing the ethical issues that arise from the billable-hour system).

56. Whether this profligate use of opinion testimony has enhanced the quality of decisions has seldom been examined. See generally Peter Huber, *Medical Experts and the Ghost of Galileo*, 54 LAW & CONTEMP. PROBS. 119 (Summer 1991) (discussing the courts' overinclusiveness of dubious expert testimony); Deborah R. Hensler, *Science in the Court: Is There a Role for Alternative Dispute Resolution*, 54 LAW & CONTEMP. PROBS. 171 (Summer 1991) (addressing whether alternative dispute resolution could help courts deal with scientific questions in cases).

cases carrying lesser financial consequences, such as civil rights litigation.⁵⁷

E. The 1983 Amendments

In 1983, the Court, acting on the advice of the Judicial Conference and with the assent of Congress, promulgated numerous revisions of the Civil Rules. Some of the 1983 amendments specifically responded to the concerns expressed by business interests and provided judges with “a blueprint for management” of big cases⁵⁸ to constrain abuses of discovery.⁵⁹ The Court also promulgated an amendment to Rule 11 that authorized judges to punish lawyers for advancing meritless contentions that wasted the courts’ attention and their adversaries’ money.⁶⁰

The idea of managerial judging, as envisioned by these 1983 amendments, emerged in the early 1970s at training seminars for rookie federal judges, and that first evolved at a time when the federal criminal and prisoner-petition caseloads were growing dramatically.⁶¹ Case management entailed increased engagement of

57. See generally JOSEPH L. EBERSOLE & BARLOW BURKE, FED. JUDICIAL CTR., DISCOVERY PROBLEMS IN CIVIL CASES 18–29 (1980) (discussing the issue of over-discovery); Wayne D. Brazil, *Civil Discovery: Lawyers’ Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787 (providing lawyers’ views on the discovery system); Wayne D. Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 873 (proposing a model rule for pretrial actions and modifications to the Advisory Committee’s proposed revisions of Rule 16); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978) [hereinafter Brazil, *Adversary Character*] (arguing that the adversarial nature of discovery impedes the actual discovery process); David L. Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055 (1979) (examining the gap between the theory and practice of discovery); David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983) (analyzing the amount of time and money spent in processing litigation).

58. ARTHUR R. MILLER, FED. JUDICIAL CTR., THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 20 (1984).

59. See FED. R. CIV. P. 26 advisory committee’s note to 1983 amendment (“Excessive discovery . . . pose[s] significant problems.”).

60. See *id.* 11 advisory committee’s note to 1983 amendment (“Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.”).

61. See Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 176–77 (1997)

judges in the conduct of pretrial proceedings for the purpose of preventing wasteful discovery.⁶² The Federal Judicial Center provided guidance in the available case-management methods.⁶³ Contrary to occasional protests, managerial practices seem to have worked reasonably well in the big cases for which they were designed.⁶⁴ And the Supreme Court did not express misgivings about the adequacy of the practice to control the excessive infliction of costs on adversaries until 2007.⁶⁵

Business interests' complaints regarding the cost of pretrial litigation in commercial and public law cases seem to have been substantially overblown. A 2009 study by the Federal Judicial Center confirms that, with the exception of a very few outlying cases, the cost of discovery and related pretrial proceedings is minor in relation to the stakes in the cases, ranging from 1.6 percent to 3.3 percent of the amounts in dispute.⁶⁶

But case management was nevertheless not without critics.⁶⁷ Judges increasingly delegated managerial tasks to growing staffs of magistrates and clerks,⁶⁸ perhaps because the tasks were sometimes deemed tedious and unworthy of the valued attention of judges

(discussing judicial education on judges' managerial roles and the beneficial aspects of promoting freely negotiated settlements).

62. See generally WILLIAM W. SCHWARZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION: A HANDBOOK FOR LAWYERS AND JUDGES* (1982) (elaborating on the necessity for judicial involvement in antitrust and complex litigation cases); Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 253–54 (1985) (discussing the importance of judicial management of the pretrial process).

63. See generally MANUAL FOR COMPLEX LITIGATION (SECOND) (1985) (outlining the basic principles of complex litigation resolution and various procedures to successfully implement these principles).

64. See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 12–13 (2009).

65. Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 898–99 (2009) (“Until *Twombly*, the Supreme Court had never openly and directly questioned the effectiveness of judicial discretion in managing litigation problems during the pre-trial phase.”).

66. LEE & WILLGING, *supra* note 64, at 2.

67. See, e.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 380 (1982) (“[M]anagerial judging may be redefining *sub silentio* our standards of what constitutes rational, fair, and impartial adjudication.”).

68. See Patrick E. Higginbotham, *A Few Thoughts on Judicial Supremacy: A Response to Professors Carrington and Cramton*, 94 CORNELL L. REV. 637, 648 (2009) (“The federal appellate courts also deploy large numbers of staff council and hand off administrative tasks to court clerks and circuit executives with their swelling staffs.”).

appointed “for life,” or because Congress was not providing adequate resources to deal with the caseloads.⁶⁹ And parties faced increasing pressure to settle or arbitrate, perhaps contributing to the present state of affairs in which the public trial has largely vanished.⁷⁰ Law is presumably still being enforced in civil cases in federal courts, but it is harder for us to see it happening in our vacant federal courtrooms.⁷¹

The 1983 amendments facilitating judicial case management were not sufficient to calm the unrest of those who saw themselves as present or prospective defendants in civil cases. Business interests continued to agitate for a revision of Rule 68 to deter parties from refusing offers of judgment by exposing them to liability for attorneys’ fees; this device would enable defendants to elevate the pressure on plaintiffs to accept low early offers.⁷² Critics saw the proposal as a device to weaken recently enacted civil rights law.⁷³ At its first public meeting in 1986, the Advisory Committee permanently tabled this proposed revision of Rule 68.⁷⁴

69. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 929–30 (2000) (“These policies entailed development of the concepts of the federal courts as a distinctive and unique venue, of life-tenured judges as hierarchically superior to but able to share jurisdiction with non-life-tenured ‘federal’ judges, and of the judicial branch as appropriately advising Congress and the country about whether to locate enforcement of new rights in the federal courts.”).

70. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 515–16 (2004) (explaining that courts have seen a decrease in both the percentages and the total number of cases that go to trial). The extent to which the expanded role of Rule 56 contributed to the phenomenon is questionable. Compare Martin Redish, *Summary Judgment and the Vanishing Trials: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1330 (2005) (“Changes in the law of summary judgment quite probably explain at least a large part of the dramatic reduction in federal trials.”), with Stephen B. Burbank, *Vanishing Trial and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 608–09 (2004) (detailing the use of summary judgment to create pressure to settle a case).

71. See generally Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745 (2010) (discussing the decline of trials in the district courts and the subsequent effects on the administration of justice).

72. For an account of the history of this device, see Robert G. Bone, “To Encourage Settlement”: Rule 68, Offers of Judgment and the History of the Federal Rules of Civil Procedure, 102 NW. U. L. REV. 1561, 1562 (2008).

73. See Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, 2641 (codified as amended at 42 U.S.C. § 1988 (2006)) (stating that in civil rights cases “the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs”). For recent comment on Rule 68, see Bone, *supra* note 72, at 1608–10 (describing the controversy over the 1983 amendment proposal to Rule 68).

74. ADVISORY COMM. ON CIVIL RULES, FED. JUDICIAL CONFERENCE OF THE U.S., MEETING OF APRIL 21, 1986, MINUTES OF MEETING 1, available at <http://www.uscourts.gov/>

F. A Personal Experience: The Role of the Reporter

It was in this political arena that I was privileged to serve the Advisory Committee as its Reporter. I worked for seven years with four chairs of the Advisory Committee—Judges Frank Johnson, Joe Weis, Frank Grady, and Sam Pointer—each of whom I admired as the sort of judge one would seek when one's life, business, or assets were at stake in a courtroom. All were strongly committed to the aims expressed in Rule 1: enforcing all legal rights as fully, as efficiently, and as quickly as circumstances might permit. But our shared efforts were nevertheless measured by the great Charles Alan Wright as a "malaise."⁷⁵

Two packages of proposed amendments to the Civil Rules that I had a hand in drafting for the Advisory Committee went up the chain of command to the Standing Committee, one in 1990 and another in 1992. Most, but not all, of our 1990 proposals became law in 1991, and most of our 1992 proposals became law in 1993.⁷⁶ As the second package reached the Judicial Conference, Judge Pointer and I concluded that it was time to bring my service as Reporter to an end.

My departure coincided with a reform in the Advisory Committee's operations to provide additional support for the Reporter. Perhaps this reform was a result of the Administrative Office concluding that the job had become more complex and demanding than it had been during the first four decades following the promulgation of the Civil Rules in 1938.⁷⁷ Professor Edward Cooper has done admirable work as my successor and has also had the very able assistance of Professor Richard Marcus. But it seems fair to say that even Professors Cooper and Marcus have not entirely calmed the waters roiled by the partisan disputes in which I became involved.

uscourts/RulesandPolicies/rules/Minutes/CV04-1986-min.pdf. See generally Steven B. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REFORM 425 (1986) (discussing the Advisory Committee's view on the ineffectiveness of Rule 68).

75. See generally Charles Alan Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1 (1994) (providing a survey of several federal rulemaking amendments).

76. Amendments to Federal Rules of Civil Procedure, 134 F.R.D. 525 (1991); Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401 (1993).

77. Indeed, there was a brief time in 1956–58 when there was no Advisory Committee and hence no Reporter. See Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified as amended at 28 U.S.C. § 331 (2006)); see also Symposium, *The Rule-Making Function and the Judicial Conference of the United States*, 21 F.R.D. 117 (1957) (discussing that legislation).

III. SUBSTANTIAL POLITICAL ISSUES CONFRONTED IN RULEMAKING: 1985–1992

A. *Issue 1: Congress and the Rules Enabling Act*

1. *Proposals for Reform.* One of the items percolating at the time of my arrival as Reporter in 1985 was the Advisory Committee's concern over pending proposals to amend the Rules Enabling Act itself. The proponent of the amendments was Congressman Robert Kastenmeier, who was the only member of Congress in my time as Reporter to take a serious interest in issues of judicial administration. He represented the second district of Wisconsin for sixteen terms, only to be defeated in 1990.⁷⁸ I hope that it was not his willingness to invest time and effort in the study and reform of judicial administration that led to his defeat.⁷⁹ He impressed me as one who had a clear sense of what he was doing and a commitment to the public good.⁸⁰

Congressman Kastenmeier's 1985 proposed amendments to the Rules Enabling Act were a response, at least in part, to the scholarship of Professor Stephen Burbank, who had been temperately critical of the 1934 establishment of a rulemaking process that lacked full transparency and sensitivity to potential substantive consequences.⁸¹ If there was a partisan connection between this proposed reform of the Act and the larger political contest between the Great Society advocates and the advocates of the deregulation of business, I was not aware of the connection.

78. Kastenmeier, Robert William, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=K000020> (last visited Oct. 25, 2010).

79. See generally Larry Kramer, *"The One-Eyed Are Kings": Improving Congress's Ability to Regulate the Use of Judicial Resources*, 54 LAW & CONTEMP. PROBS. 73 (Summer 1991) (describing the problems with congressional engagement in issues of judicial administration). But see Avern Cohn, *A Judge's View of Congressional Action Affecting the Courts*, 54 LAW & CONTEMP. PROBS. 99, 99 (Summer 1991) (questioning whether the creation of a new agency in Congress will best improve congressional knowledge of events in the federal court system).

80. The federal courthouse in Madison bears his name, as does a lecture series at the University of Wisconsin Law School. "In 1985, Kastenmeier received the Warren E. Burger Award, presented by the institute for Court Management, and the Service Award of the National Center for State Courts. In 1988, he was honored by the American Judicature Society with its Justice Award for his contributions to improving the administration of justice." *The Robert W. Kastenmeier Lecture*, U. OF WIS. L. SCH., <http://www.law.wisc.edu/alumni/kastenmeier.html> (last visited Oct. 25, 2010).

81. See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (arguing that lawmaking requires substantive transparency in addition to procedural safeguards).

2. *Politicization and Transsubstantivity.* The two provisions of the Kastenmeier proposal were intended to elevate the sensitivity of the rulemaking process to political preferences and consequences. The first idea was to open our proceedings to observers and lobbyists.⁸² Judge Johnson and others were not happy with that proposal, fearing that it would introduce interest-group politics into the rulemaking process. There had been from the beginning a practice of publishing proposed rules for public comment. But some perceived that the 1934 vision of procedural rulemaking, as expressed in the structure of the first Advisory Committee and in the abstract, transsubstantive promise of Rule 1, aimed to avoid interest-group politics and concentrate on effective enforcement of the law. Those who opposed the change feared that lobbyists in our committee meetings might deprive the rulemaking process of its disinterest, and thus of its integrity and entitlement to public acceptance.

An example of disinterested rulemaking was the celebrated 1966 enlargement of the class action, which was approved by a unanimous Advisory Committee.⁸³ Could such reforms, motivated by an innocent desire of rulemakers to serve the public good with more effective law enforcement, be achieved if interest groups were invited to participate in their deliberations? The Advisory Committee also recalled that special interest amendments had wrecked the admirably succinct New York Code of 1848 advanced by David Dudley Field⁸⁴ in the decades following its enactment. These changes were ultimately embodied in the lengthy and uncelebrated Throop Code, assembled in the 1880s to record what the state legislature had done to Field's Code in response to lobbying by the self-interested.⁸⁵

82. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 401, 102 Stat. 4642, 4649 (1988) (codified at 28 U.S.C. § 2073(c) (2006)) (opening Judicial Conference committee meetings to the public in most circumstances).

83. This occurred in the conference room of Covington & Burling LLP in Washington, D.C., where the Advisory Committee was sitting as guests of committee member Dean Acheson. The class-action enlargement was not presented at the time as a major political reform. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 386-87 (1967) (describing the formulation of revised Federal Rule 23).

84. On Field's role, see CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 18-19 (1928). See generally DAUN VAN EE, *DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW* (1986) (describing the life and work of David Dudley Field).

85. THROOP'S ANNOTATED CODE OF CIVIL PROCEDURE (Montgomery H. Throop ed., 1st ed. 1886). For further discussion, see MILLAR, *supra* note 20, at 55-56; Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2046 (1989).

The structure of the rulemaking process was designed to encourage the making of transsubstantive rules. This purpose reflected the thinking of the celebrated English theorist Jeremy Bentham, who encouraged the separation of substance from procedure to focus the courts' attention more on effective law enforcement and less on the intricacies of procedures fashioned separately for each common law form of action.⁸⁶ Perhaps relying principally on the advice of David Dudley Field, numerous states in the nineteenth century enacted laws embracing Bentham's vision.⁸⁷ Those who designed and enacted the 1934 Rules Enabling Act did not suppose that a procedure equally suited to all kinds of cases could be devised, but if special rules for a substantive category of cases were needed, their creation would be a task for Congress. Meanwhile, until such a special need should appear, a politically unaccountable group should work to serve the broad aims expressed by Bentham and stated in Rule 1. Or so it was thought.⁸⁸

But after assessing the situation on the ground in 1985, it seemed to the Advisory Committee unlikely that continued resistance to open meetings would succeed. Procedural rules have substantive consequences, and the 1985 Advisory Committee felt that those

86. 2 JEREMY BENTHAM, *Principles of Judicial Procedure, with the Outlines of a Procedure Code*, in THE WORKS OF JEREMY BENTHAM 5 (John Bowring ed., Edinburgh, William Tait 1843) ("By procedure, is meant the course taken for the execution of the laws [to accomplish] the will declared, or supposed to be declared, . . . in each instance.").

87. See generally DAVID DUDLEY FIELD, WHAT SHALL BE DONE WITH THE PRACTICE OF THE COURTS? (1847), reprinted in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 226 (A.P. Sprague ed., New York, D. Appleton & Co. 1884) (considering whether a uniform code of pleading is practicable); MILLAR, *supra* note 20 (examining civil procedure in American trial courts); Steven N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988) (discussing the development of the Field Code).

88. See, e.g., Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1170 (2006) (suggesting that today's reformers are uncertain about transsubstantive rules); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 739–40 (1975) (examining the tension between individual issues and transsubstantive rules of procedure); Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1746–50 (1992) (noting that judges require discretion when applying transsubstantive rules, but that this threatens the nature of the rules). Skepticism has been expressed in recent times. Rex R. Perschbacher & Debra Lyn Bassett, *The Revolution of 1938 and Its Discontents*, 61 OKLA. L. REV. 275, 284–86 (2008) (explaining that the goals of the drafters of the Rules Enabling Act of 1934 were different from what reformers are trying to accomplish today). For a thoughtful history of the idea, see David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371 (2010).

affected by a change in the rules should be heard.⁸⁹ These hearings required wide distribution of the Reporter's preliminary drafts inviting public comment. A few interest groups did show up at meetings in my time, and they were sometimes helpful, but they were unable to muster material influence on an Advisory Committee controlled by independent judges serving during good behavior.⁹⁰ Unlike Congressional lobbyists, they had no ability to affect the careers of the life-tenured judges whom they lobbied.

3. *Lobbying for Supersession.* Before the advent of public meetings, Judge Johnson as chair directed me to enlist resistance to the second provision of Congressman Kastenmeier's proposed revision of the Rules Enabling Act to which the Advisory Committee objected. This was the proposed repeal of the supersession clause⁹¹ declaring that existing statutes in conflict with new rules are to "be of no further force or effect." The House of Representatives approved the repeal,⁹² but the Advisory Committee believed that the clause served to constrain conflicting and confusing interpretations of the Civil Rules based on inferences drawn from previous substantive enactments of Congress.⁹³

I succeeded in enlisting the aid of the ABA Section on Litigation, the American College of Trial Lawyers, and the Association of the Bar of the City of New York. These groups induced the Senate Judiciary Committee to hold a hearing that I attended on May 28, 1989. Former Attorney General Ben Civiletti, then chair of the ABA Section, offered testimony in favor of supersession. Professors Edward Cooper, Mary Kay Kane, and Charles Alan Wright also submitted statements supporting supersession. Professors Judith Resnik, representing the ACLU, and Stephen Burbank submitted statements opposing supersession. The Advisory Committee's support for supersession prevailed in the Senate, and the law as enacted in 1988 retained the supersession

89. It was possibly for this reason that Judge Johnson stepped down from the Advisory Committee's chair, so that it was Judge Weis who presided over the Advisory Committee's first public meetings.

90. For my contemporaneous account, see Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161 (1991).

91. H.R. REP. NO. 99-422, at 22-23 (1985).

92. H.R. 3550, 99th Cong., 131 Cong. Rec. 35,190-92 (1985).

93. For elaboration on the uses of the clause, see Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 281, 322-27.

clause.⁹⁴ I note, however, that the problem with supersession abides: there is now a circuit split on the application of the clause to the divergence between Section 3731 of Title 18 and Rule 4(b) of the Rules of Appellate Procedure.⁹⁵ Whether this recent conflict reflects the possibility that our victorious lobbying was misguided I leave to wiser heads better informed by twenty-five years of additional experience.

The Advisory Committee thereafter devoted our attention to the text of the Civil Rules, to the rules' interpretation or misinterpretation by courts, and to any available data from the Administrative Office that might suggest how best to achieve the Rule 1 aims of reducing needless cost, delay, and confusion. In that spirit, and perhaps in response to the public debate over supersession and transsubstantivity, the Advisory Committee amended Rule 1 to urge pursuit of those aims in the case-managerial practices that had begun to replace the traditional forms of litigation.

B. Issue 2: Belated Amendment to Correct the Identification of a Defendant

A modest example of our committee work was Rule 15(c), pertaining to the relation between pleading amendments and statutes of limitations. The need to revise this rule came to the Advisory Committee's attention because of the 1986 decision of the Supreme Court in *Schiavone v. Fortune*.⁹⁶ The plaintiffs had sued alleging that they were defamed in *Fortune* magazine. Belatedly, they learned that there was no such corporate entity as Fortune. They then served the summons and complaint on the corporate publisher, Time, Inc. The Supreme Court held that the statute of limitations had run, barring their claims.⁹⁷ Given that Time had in fact been fully informed of the filing of the claim long before the limitation period had run, this seemed inconsistent with the purpose of Rule 15(c) allowing amendments to "relate back" for the purposes of the statute. It also seemed at odds with the aims expressed in Rule 1.⁹⁸

94. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 401, 102 Stat. 4642, 4648-49 (1988) (codified at 28 U.S.C. § 2072(b) (2006)).

95. See Anthony Vitarelli, Comment, *A Blueprint for Applying the Rules Enabling Act's Supersession Clause*, 117 YALE L.J. 1225, 1225 (2008).

96. *Schiavone v. Fortune*, 477 U.S. 21 (1986).

97. *Id.* at 27.

98. Note the similarity of the *Schiavone* case to the Court's more recent holdings that some rules imposing time limits that it deems to be jurisdictional cannot be waived by a defendant—

The Advisory Committee invested a lot of time in the task of revising Rule 15(c), partly as a result of my shortcomings in drafting a text that fully solved the problem. In the effort to clarify the rule, we were striving to achieve simplicity; to that end, we tried to adhere to the rule urged by Professor Rosenberg, which cautioned us to keep the text simple by removing a word to make room for any word we proposed to add. In due course we recommended an amendment that was promulgated in 1991. Alas, our amendment was not so clear that it resolved the recurring issues in later cases. Scores of reported decisions have since interpreted our rule. Some of them may have been wrong.⁹⁹ Yet in 2010, the Court unanimously decided a case closely resembling the *Fortune* case in conformity with the 1991 revision. It relied in part on the statement of legislative purpose set forth in the Advisory Committee Notes to explain the text.¹⁰⁰ Curiously, Justice Scalia wrote a very brief concurring opinion¹⁰¹ to express his disapproval of the reference to the explanatory committee note that had been presented and presumably considered by the Advisory Committee, the Standing Committee of the Judicial Conference, the Conference, the Supreme Court, and both Houses of Congress.

Similar explanatory notations are commonly found attached to the recommendations of the American Law Institute or the Commissioners on Uniform State Laws. Their purpose is the same as the formal Opinion of the Court—to advance the prospect of common understanding and deter idiosyncratic interpretations by judges who are expected to enforce law.

A few weeks after Justice Scalia's curious concurrence, he repeated his protest when the Court cited the Advisory Committee

even one who is fully informed and in no way prejudiced by a plaintiff's mistaken noncompliance. *E.g.*, *Bowles v. Russell*, 127 S. Ct. 2360 (2007). In *Bowles*, the Court enforced the limit on the time for filing an appeal from a denial of habeas corpus. The petitioner missed by one day but filed on the day that the defense and the trial court had agreed was the last day. *Id.* at 2366–67. I question whether any member of Congress who voted for the law would have approved that result. *But see* Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 3 (2008) (explaining the roles of jurisdictional and nonjurisdictional rules). I regard the issue as one ripe for consideration by the Advisory Committee on Appellate Rules.

99. *Cf.* *Goodman v. Praxair, Inc.*, 494 F.3d 458, 469–73 (4th Cir. 2007) (en banc) (holding that the relation-back rule is not limited to a mistake about the proper party's identity).

100. *Krupski v. Costa Crociere S.p.A.*, 130 S. Ct. 2485, 2494–95 (2010).

101. *Id.* at 2498–99 (Scalia, J., concurring).

Notes to one of the Federal Rules of Criminal Procedure.¹⁰² This time, Justice Thomas joined.

These protests reveal that some of the Justices resist ideas embedded in the Rules Enabling Act as impediments to the exercise of discretion by the Justices in making procedural laws conforming to their superior judgment. Among recent authors, Professor Benjamin Spencer has best reminded us that the rule-amendment process is preferable to judge-made law because it is a more democratic, transparent, and accountable method of law reform,¹⁰³ even if it may impede the lawmaking ambition of the Justices.

C. Issue 3: Rule 48 and Trial by Jury

The Supreme Court has on several occasions chosen to disregard the text of the Civil Rules, the advice of those engaged in the rulemaking process, and even the text of the Constitution to conform the Civil Rules to the preferences of a majority of the Justices.¹⁰⁴ At the time of my arrival as Reporter, there was ferment over what the Supreme Court and the district judges had done to the right to a jury in a civil case as assured by the Seventh Amendment. The Advisory Committee was obliged at least to reconsider the text of Rule 49, which had become misleading in light of then-recent developments altering the size of the civil jury.¹⁰⁵

I was among the many who disapproved of the Supreme Court's decision confirming the discretion of district judges to impanel juries of fewer than twelve.¹⁰⁶ That decision validated local rules that were not consistent with the text of Rule 49. Those local rules were not connected to the politics of Rule 1 or to business interests' resistance

102. *Black v. United States*, 130 S. Ct. 2963, 2963–70 (2010) (Scalia, J., concurring).

103. A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 454 (2008). The same point was also made in reporting the *Twombly* decision in *The Supreme Court, 2006 Term—Leading Cases: Civil Procedure: Pleading Standards*, 121 HARV. L. REV. 305, 313 (2007).

104. A major influence in moving the Court to think in this way was Justice Brennan, who saw his office as one that would “shape a way of life for the American people.” DAVID E. MARION, *THE JURISPRUDENCE OF JUSTICE WILLIAM J. BRENNAN, JR., THE LAW AND POLITICS OF “LIBERTARIAN DIGNITY”* 161–62 (1997).

105. ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE 122 (1937), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV04-1937.pdf> (“Rule 49. Jurors of Less than Twelve. – *Majority Verdict*. The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding or a stated majority of the jurors shall be taken as the verdict of finding of the jury.”).

106. *Colgrove v. Battin*, 413 U.S. 149, 159–60 (1973).

to private enforcement of public law, but did reflect a different divide, of constitutional import, over the measure of discretion to be vested in federal judges. It seemed that the Judicial Conference generally favored judicial discretion. Others favored more explicit rules to guide judges and lawyers and assure that the law was evenhandedly enforced.

In the early 1970s at a Fourth Circuit judicial conference, I heard Chief Justice Burger in an informal discussion with perhaps twenty lawyers propose that the civil jury be eliminated to allow district judges to decide cases more efficiently.¹⁰⁷ The decision to allow judges to reduce the civil jury to six was, for the Chief Justice, a halfway measure, but it conformed to a recommendation of an ABA committee.¹⁰⁸ The idea of a six-person jury had been presented to Congress in 1971, and again in 1973 and 1977, but Congress took no positive action.¹⁰⁹

Given its disregard for the tradition and text of the Seventh Amendment and the failure of the proposal to gain the acceptance of Congress, the decision also implied that district judges were practically free to exercise judicial power in the manner of English chancellors¹¹⁰ and to disregard the text of Rule 49 by allowing a jury of fewer than twelve by stipulation of the parties. That disregard of the text was a source of concern to the Advisory Committee.

After perhaps improvidently expressing my own disapproval of the Court's decision at a conference at the University of Chicago convened to discuss the topic,¹¹¹ I put the issue of Rule 48 on the Advisory Committee's agenda. It was clear that the committee in 1990 would not reconsider the six-person jury, but it did agree to make the text of the rule correspond to reality. A few years later, after my time, the committee supported a return to the twelve-person jury, but it was unable to gain the support of the Judicial Conference.¹¹²

107. See Warren E. Burger, *The State of the Federal Judiciary—1971*, 57 A.B.A. J. 855, 858 (1971).

108. *Report Number 1 of the Special Committee on Coordination of Judicial Improvements*, 99 A.B.A. ANN. REP. 182, 305 (1974).

109. For an account of the efforts, see Resnik, *supra* note 61, at 141–43.

110. See Subrin, *supra* note 25, at 918–20 (explaining the role of chancellors).

111. Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 51.

112. Leading the effort was Richard S. Arnold. See Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 27–35 (1993).

IV. REFORMING THE DISCOVERY RULES: MANDATORY DISCLOSURE

While we attended to such technical matters, the political pot of deregulation or tort reform to protect business from unwelcome private law enforcement continued to boil, and the Advisory Committee was feeling its heat.

A. *The Text of Rule 35*

Congress again joined in (or intruded into) our enterprise in 1988 by quietly enacting as Section 7047 of its mammoth Anti-Drug Abuse Act a revision of Rule 35 authorizing mental examinations of parties by psychologists as well as psychiatrists.¹¹³ The Advisory Committee had no objection to this amendment and followed the lead of Congress, proposing in 1991 that Rule 35 be amended to enable parties to secure examinations by other “suitably” qualified professionals—the experts perhaps best suited to assess some personal injuries.¹¹⁴ Some regretted that Congress had not referred the issue to the Judicial Conference for its consideration.

B. *Localization*

In the same 1988 law, Congress also expressed concern over the localization of federal law by the promulgation of diverse local rules of procedure.¹¹⁵ Delocalization had been a *raison d’être* of the 1938 Rules. Localization was seen to be a significant problem because it introduced additional elements of complexity and uncertainty into the national law governing proceedings in the federal courts.¹¹⁶ Some districts’ elaborate local rules also threatened disharmony with the secondary aim of the 1934 Act—to enable counsel to represent clients

113. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7047, 102 Stat. 4181, 4401 (codified as amended at 18 U.S.C. § 4247 (2006); FED. R. CIV. P. 35). Section 7047 extended the role of psychologists in enforcing the drug laws; Congress also amended Rule 35 to accommodate the role of psychologists.

114. FED. R. CIV. P. 35 advisory committee’s note to 1991 amendment.

115. *Id.* For a current review of the problem of localization, see Samuel P. Jordan, *Local Rules and the Limits of Trans-Territorial Procedure*, 52 WM. & MARY L. REV. (forthcoming Nov. 2010).

116. See Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 55–58 (1997); Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN L. REV. 1447, 1449 (1994); Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1589–92 (1994).

in diverse federal courts without the need to study local practices. Such unleashing of local rulemakers was seen as threatening chaos.¹¹⁷

The most common kind of local rule invalidated by Congress was a restriction on the number of interrogatories a party could serve except by leave of court;¹¹⁸ almost every district had such a rule, and after 1988 all of them were invalid. The Advisory Committee that I served felt an obligation to respond both to the concern of Congress about localization¹¹⁹ and the concerns expressed by local advisory committees that were prone to constrain discovery practices.

C. *Discovery Costs*

The center of much political discourse then, as now, was the cost and effectiveness of the discovery rules. No one doubted that many lawyers were very thorough and sometimes abusive in conducting discovery. An unextraordinary example brought to my attention was an extended three-day deposition of a university president by a lawyer advancing a claim for medical malpractice against the university's hospital. It seemed obvious by the second day of the deposition, if not long before, that the deponent had no relevant information, but the deposition continued. The apparent aim of the extended deposition was to induce the president to agree to a settlement in order to terminate his endless questioning. Such abuses were equally obvious to many observers of big commercial cases litigated by lawyers paid by the hour to conduct depositions in teams of three or more.

D. *The Task Force on Civil Justice: Justice for All*

In 1987, in response to the political ferment over such costs, the Brookings Institution appointed a Task Force on Civil Justice Reform. This appeared to be a response to a proposal by Senator Joseph Biden, who was at the time the chair of the Judiciary Committee. He may even have suggested some or all of the thirty-five members of the study group. They met several times at Brookings to

117. See Carrington, *supra* note 32, at 938–39. Localism abides, and some local rules are nontranssubstantive. Marcus, *supra* note 88, at 427–29.

118. COMM. ON RULES OF PRACTICE & PROCEDURE ON THE JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE LOCAL RULES PROJECT 95–99 (1988).

119. E.g., Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 860–62 (1989).

debate the issues, received the results of a Lou Harris poll,¹²⁰ and in 1989 published a report entitled *Justice for All: Reducing Costs and Delay in Civil Litigation*.¹²¹ This title suggested fidelity to the aims of the 1938 Civil Rules and the antecedent politics favoring effective private law enforcement. It favored ideas then circulating among the federal judiciary: differential case management, earlier judicial engagement, encouragement of voluntary exchange of information, early resolution of discovery disputes before the filing of motions, and referral of appropriate cases to alternative dispute resolution programs. *Justice for All* also advocated empirical studies by an independent source in addition to those provided by the Federal Judicial Center.¹²²

There was at the time of this publication a manifest shortage of data to resolve conflicting observations bearing on the feasibility of its proposals. Yet *Justice for All* provided the basis for Senator Biden's proposed legislation, enacted as the Civil Justice Reform Act of 1990.¹²³ The Business Round Table¹²⁴ and the American Institute of Certified Public Accountants supported the Act,¹²⁵ but some federal judges regarded such action by the Senate as an affront to judicial independence and opposed the measure. In their view, procedural rules were solely the business of the Judicial Conference.¹²⁶ The Senate Committee Report, in the tradition of the 1938 Civil Rules, explained that the Act was "to promote for all citizens—rich or poor,

120. LOUIS HARRIS & ASSOCS., *PROCEDURAL REFORM OF THE CIVIL JUSTICE SYSTEM: A STUDY CONDUCTED FOR THE FOUNDATION FOR CHANGE, INC.* (1989) (stating that many federal judges, corporate counsel, and public interest litigators agreed that transaction costs are problematic and can result in unequal justice).

121. BROOKINGS INST., *JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION* (1989). Charles Alan Wright generously describes the report as "particularly influential." WRIGHT, *supra* note 26, at 436. Its influence was, however, preordained; causation went from the Senate to Brookings, not from Brookings to the Senate.

122. Cf. Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 *LAW & CONTEMP. PROBS.* 67, 67–68 (Summer 1988) (explaining the need for empirical studies and suggesting a methodology).

123. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, tit. I, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471–482 (2006)).

124. Press Release, PR Newswire, Importance of Civil Justice Reform Act of 1990 Stressed by the Business Roundtable (Jan. 23, 1990) (on file with the *Duke Law Journal*). See generally Jeffrey J. Peck, "Users United": *The Civil Justice Reform Act of 1990*, 54 *LAW & CONTEMP. PROBS.* 105, 107 (Summer 1991) (discussing the Civil Justice Reform Act's substantive changes and the process leading to the creation of the Act).

125. *AICPA endorses Civil Justice Reform Act*, J. ACCOUNTANCY, Apr. 1990, at 27, 27.

126. See Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 *MINN. L. REV.* 375, 407–35 (1992); Robel, *supra* note 116, at 1450.

individual or corporation, plaintiff or defendant—the just, speedy and inexpensive resolution of civil disputes in our Nation’s federal courts.”¹²⁷ It empowered district courts to experiment with diverse forms of case management in response to the not-very-original ideas set forth in *Justice for All*.¹²⁸ The experimenting district courts were required to appoint and consult local advisory committees of suitable diversity.¹²⁹ The statute called for an independent study of the results over a seven-year period.¹³⁰

E. The Idea of Mandatory Disclosure

In 1989, at the direction of the Advisory Committee, I drafted for its consideration a possible amendment to Rule 26 requiring parties to make voluntary disclosures of relevant and discoverable information. My draft was a radical proposal requiring disclosure of just about everything an advocate might have that the other side might want to know about a newly filed case. The basic idea of mutual disclosure had been suggested by then-Magistrate Wayne Brazil in 1978, and our draft adopted his idea.¹³¹

Consistent with traditional practice, as well as with Congressman Kastenmeier’s policy of transparency in rulemaking, we circulated this preliminary draft to seek comment from diverse interested

127. S. REP. NO. 101-416, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6804.

128. Civil Justice Reform Act of 1990, § 102, 104 Stat. at 5089–90 (codified at 28 U.S.C. § 471 note).

129. The act ordered each experimenting U.S. district court to implement a Civil Justice Expense and Delay Reduction Plan under the direction of an advisory group comprising “those who must live with the civil justice system on a regular basis.” S. REP. NO. 101-416, at 414, *reprinted in* 1990 U.S.C.C.A.N. at 6817 (quoting 136 CONG. REC. 589 (1990) (statement of Sen. Biden, Chairman, S. Comm. on the Judiciary)).

130. Civil Justice Reform Act of 1990, § 103, 104 Stat. at 5096 (codified at 28 U.S.C. § 471 note) (“The requirements set forth in sections 471 through 478 . . . shall remain in effect for seven years after the date of the enactment of this title.”). There were criticisms of the Act. *See, e.g.,* A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN’S L. REV. 877, 894 (1993) (“[I]t must be clear that this is hardly the way to maintain uniformity in a national system of courts.”). Among the problems presented was a difficulty in measuring its expiration. *See* Carl Tobias, *The Expiration of the Civil Justice Reform Act*, 59 WASH. & LEE L. REV. 541, 542–43 (2002) (noting that there were differing interpretations of the Act’s expiration).

131. Brazil, *Adversary Character*, *supra* note 57, at 1348–57 (1978) (arguing that the duty to voluntarily disclose information should not be limited to formal investigations, “but [should] extend[] to all material data, regardless of how it is acquired”); *see also* William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 721 (1989) (suggesting that discovery rules be altered to require “prompt disclosure of all material documents”).

scholars, judges, and lawyers. It was obvious to the Advisory Committee when it met to consider my draft and the comments received that our proposal needed work. Among its worrisome features was a requirement that all expert reports be disclosed. The Advisory Committee sensed that this went too far; such material might be discoverable in due course, but the parties could not properly be required to commit themselves to a line of expert testimony before the issues of fact, if any, were clearly defined. Yet for want of a better idea, some of the experimental districts promulgated our draft as a local rule to be tested empirically.

The Advisory Committee sought to contain such rampant localization of discovery practice. So, after further consideration, we circulated a draft of the rule that would authorize local districts to enact disclosure rules more prudently limited than the rule I had improvidently circulated earlier. The Advisory Committee proposed adding two full pages of text to Rule 26(a) prescribing what the Advisory Committee deemed an appropriate duty of disclosure and its limits; we stopped short in that draft of requiring counsel to anticipate the allegations of the adversary. On receipt of this draft, some districts promulgated it as their local rule, and some drew criticism for doing so.¹³² But as a result, there were three and possibly more versions of Rule 26 in different local districts.

F. The Council on Competitiveness

Meanwhile, as the local district advisory committees were doing their work pursuant to the Civil Justice Reform Act, the political premises of that law were being contested by a Republican administration seeking reelection in 1992. The Republicans positioned themselves as faithful to business interests beleaguered not only by the high cost of litigation, but also by substantive concerns over the application of tort law to deter disapproved business practices. Vice President Dan Quayle was appointed to lead a Council on Competitiveness staffed largely—if not entirely—by loyal Republicans committed to protecting the ability of American business

132. See Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 813–21 (1991) (describing the observations of attorneys in Florida following the adoption of the rule in their district).

to compete profitably in global markets.¹³³ Deregulation was their often-stated aim.

In the same vein, and contemporaneous with the appointment of the Council on Competitiveness, scholar and Circuit Judge Frank Easterbrook protested that American business interests were being threatened because trial judges were helpless to control parties abusing the discovery process. Judge Easterbrook viewed the case-management powers conferred on district judges as inadequate to the task.¹³⁴ This assessment was no more rooted in data than was *Justice for All*, but Judge Easterbrook expressed no need for information about the facts on the ground.

The Quayle Council on Competitiveness conducted hearings, and in 1990 I was summoned to a Council hearing in the Department of Justice to explain the ongoing consideration of the discovery rules and the reasons, if any, for not repealing Rules 26 through 37. It is fair to say that my words were without effect. In 1991, the Council published its *Agenda for Civil Justice Reform*,¹³⁵ recommending many changes in the civil justice system, including reversing the longstanding American Rule¹³⁶ and introducing the principle that the

133. See DAVID S. BRODER & BOB WOODWARD, *THE MAN WHO WOULD BE PRESIDENT: DAN QUAYLE* 125–28 (1992) (“[Quayle] made his chairmanship . . . a command post for a war against government regulation of American business.”); Warren T. Brookes, *The President’s Council on Competitiveness*, *NATION’S BUS.*, May 1989, at 32, 32 (noting that Vice President Quayle was the perfect candidate to run “this potentially pathfinding effort”). The House of Representatives denied funding to the Council. Kenneth J. Cooper, *Divided House Bars Funds for Quayle Competitiveness Council*, *WASH. POST*, July 2, 1992, at A6; see also Jonathan H. Adler, *Quayle’s Hush-Hushed Council*, *NAT’L REV.*, Nov. 2, 1992, at 28, 28 (“Democrats called the vote an act of good government while Republicans denounced it as campaign-year politics.”).

134. Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638–39 (1989) (emphasizing that judges have little control over the discovery process because the parties “control the legal claims to be presented and conduct the discovery themselves”). Contrast the speculative view of Judge William Schwarzer, see Schwarzer, *supra* note 131, at 707, and the contrary opinion expressed by Judge Richard Posner in *American Nurses Ass’n v. Illinois*, 783 F.2d 716, 723–27 (7th Cir. 1986) (observing that the Council’s main goal was to reduce regulation).

135. PRESIDENT’S COUNCIL ON COMPETITIVENESS, *AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA* (1991).

136. The American Rule was expressed in Act of Feb. 26, 1853 (Fees Act), ch. 80, §§ 1, 3, 10 Stat. 161, 161–69. The Act expressed the holding of the Court in *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796), that counsel’s fees were not properly included in damages. *Id.* at 306; see also John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 9 (Winter 1984) (explaining that the recoverable amount of attorney fees is determined by the legislature); John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1567, 1571 (1993) (noting that the

loser must pay the full costs of the winner of a lawsuit. The Council did not advance my suggestion to reduce discovery costs by forbidding hourly billing by lawyers engaged in discovery to eliminate the incentive for wasteful practices.

Vice President Quayle was an outspoken champion of the Council's *Agenda*,¹³⁷ and though he was not alone in voicing that view,¹³⁸ his explanatory remarks to a meeting of the ABA were not well received.¹³⁹ Indeed, in a blistering denunciation, Talbot D'Alemberte, the President of the ABA, accused Vice President Quayle of using discredited statistics to advance ill-founded views.¹⁴⁰ As Judge Learned Hand had observed long before, rhetoric

American Rule "reflects simple adherence to legislative commands"); see also William W. Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147, 148 (1992) (arguing that a loser-pays rule in the U.S. would deter some litigation because of the risk of having to pay the winner's fees if unsuccessful).

137. See Dan Quayle, *Too Much Litigation: True Last Year, True Now*, NAT'L L.J., Aug. 10, 1992, at 17 ("Our recommendations . . . will result in swifter, and less costly, justice."); Dan Quayle, Vice President of the U.S., Remarks to the American Business Conference, in FED. NEWS SERV., Oct. 1, 1991 ("Despite the obvious—that there are social and economic costs when litigation is overused or abused—some lawyers with an interest in preserving the status quo have maintained that there really are no problems in our legal system.").

138. See, e.g., PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 4 (1988) (suggesting that the increase in tort litigation "costs American individuals, businesses, municipalities, and other government bodies at least \$80 billion a year" in the form of a tort tax); Jack Anderson, *U.S. Has Become Nation of Lawsuits*, WASH. POST, Jan. 25, 1985, at B8 ("No case is too distant, no client too remote to daunt America's tenacious lawyers—if the fee is right."); George [H.W.] Bush, President of the U.S., Remarks at a Labor Day Picnic, in FED. NEWS SERV., Sept. 7, 1992 (advocating for reform in the civil justice system to decrease the amount America spends on lawsuits); Robert F. Dee, *Blood Bath*, ENTERPRISE, Mar.–Apr. 1986, at 3 ("Like a plague of locusts, U.S. lawyers with their clients have descended on America and are suing the country out of business. Literally.").

139. David Margolick, *Address by Quayle on Justice Proposals Irks Bar Association*, N.Y. TIMES, Aug. 14, 1991, at A1. For his account of his presentation, see DAN QUAYLE, STANDING FIRM: A VICE-PRESIDENTIAL MEMOIR 282–90 (1994).

140. Randall Samborn & Rorie Sherman, *Quayle Spices Up ABA Meeting*, NAT'L L.J., Feb. 17, 1992, at 1. Among the studies that the vice president appeared not to have consulted were PAUL R. CONNOLLY, EDITH A. HOLLEMAN & MICHAEL J. KUHLMAN, FED. JUDICIAL CTR., JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY (1978), and EBERSOLE & BURKE, *supra* note 57. Related research, which the vice president may not have consulted, includes PROJECT FOR EFFECTIVE JUSTICE, FIELD SURVEY OF FEDERAL PRETRIAL DISCOVERY: REPORT TO THE ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE (1965); MAURICE ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE: A CONTROLLED TEST IN PERSONAL INJURY LITIGATION (1964); DANIEL SEGAL, FED. JUDICIAL CTR., SURVEY OF THE LITERATURE ON DISCOVERY FROM 1970 TO THE PRESENT: EXPRESSED DISSATISFACTIONS AND PROPOSED REFORMS (1978); Maurice Rosenberg, Professor of Law, Colum. L. Sch., Changes Ahead in Federal Pretrial Discovery, (Mar. 23, 1968), in 45 F.R.D. 479 (1969).

forecasting doom, such as the Vice President's, has been heard since the time of Hammurabi.¹⁴¹ Professor Marc Galanter soon offered empirical evidence that the "litigation explosion" to which the Council on Competitiveness purported to respond did not exist;¹⁴² there was no contrary study produced to question his conclusion.

In due course, the Council on Competitiveness made some recommendations that resembled those advanced by the Brookings group.¹⁴³ One notable recommendation that may have deserved more attention than it received aimed to constrain overuse of expert testimony.¹⁴⁴ Professor Deborah R. Hensler assessed the council's broader proposals as going well beyond procedural reform; "[they] seek to change the current balance between individual plaintiffs and corporate defendants, in favor of the latter. That agenda," she observed, "is a political one, and it ought be debated and decided on the floors of Congress and state legislatures."¹⁴⁵ No one contended otherwise, but few debates, if any, were held.

G. Empirical Evaluation of Mandatory Disclosure

While the Council on Competitiveness was having its day,¹⁴⁶ the Advisory Committee was receiving early reports of the ongoing

141. See *supra* note 52.

142. Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 83–90 (1993).

143. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 135 (recommending fifty specific reforms designed to improve efficiency in litigation). Its recommendations were embodied in the Access to Justice Act, S. 2180, 102d Cong. (1992); see also Exec. Order No. 12,778, 3 C.F.R. 359 (1992). See generally Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559 (1992) (highlighting proposals for civil justice reform). For an account of the recent developments in civil justice reform, see Carl Tobias, *Civil Justice Reform Roadmap*, 142 F.R.D. 507, 509–11 (1992); Carl Tobias, *Executive Branch Civil Justice Reform*, 42 AM. U. L. REV. 1521, 1552–58 (1993).

144. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *supra* note 135, at 21–22 (suggesting a reform of the rules controlling expert witnesses).

145. Deborah R. Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Reform*, 75 JUDICATURE 244, 250 (1992); see also Carl Tobias, *Silver Linings in Federal Civil Justice Reform*, 59 BROOK. L. REV. 857, 858–60 (1993) (acknowledging the benefits of the Civil Justice Reform Program); Weinstein, *supra* note 54, at 833–34 (arguing that procedural civil justice reforms are having a substantive effect without being framed as substantive reforms).

146. A nongovernmental organization of "CEOs, university presidents and labor leaders" took the same name in 2002. *About Us—Compete.org*, COUNCIL ON COMPETITIVENESS, <http://www.compete.org/about-us> (last visited Sept. 27, 2010). For a scorching assessment of the Quayle Council's handiwork, see *Undoing Quayle Council Damage*, OMB WATCH (July 3, 2002), <http://www.ombwatch.org/node/740>.

empirical studies envisioned by the Brookings group and conducted by RAND¹⁴⁷ and the Federal Judicial Center.¹⁴⁸ The early data indicated that the disclosure requirements established in some district courts were achieving modest savings in the cost of litigation. Although the seven-year period of experimentation specified by the 1990 Act had five years yet to run, the Advisory Committee decided in 1992 to recommend the promulgation of our improved draft of Rule 26, lending support to the local rules requiring limited disclosures to adversaries before any requests.

H. Other Limitations: Rules 16, 30, and 33

While it was reconsidering Rule 26, the Advisory Committee also agreed to limit the number and length of depositions¹⁴⁹ and the number of written interrogatories¹⁵⁰ that a party might impose on an adversary without leave of court. The Advisory Committee proposed revisions of Rules 30 and 33 for those purposes; we also proposed revisions of other discovery rules¹⁵¹ to fit them to the 1992 package. And we proposed to amend Rule 16 to permit and encourage greater use of pretrial meetings to plan discovery and trial. The Advisory Committee modestly expected these amendments to serve the stated aims of both the competing Quayle and Biden groups, and empirical evidence suggests that at least some did.¹⁵²

These modest reforms were not expected to resolve all the disarray, but at least some of us thought that they might help to calm the storm of the Council on Competitiveness. We also thought they would ease the concern about the proliferation of localization threatening the national uniformity that had been the first object of the 1934 law and the reason that many states had signed on to the

147. James S. Kakalik, Terence Dunworth, Laural A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaiana, *Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, 49 ALA. L. REV. 17, 17–19 (1997). For a study of this report, see Bryant G. Garth, *Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research*, 49 ALA. L. REV. 103 (1997).

148. DONNA STIENSTRA, MOLLY JOHNSON & PATRICIA LOMBARD, FED. JUDICIAL CTR., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, at 1 (1997).

149. FED. R. CIV. P. 30(a)(2); *id.* 30(d)(1).

150. *Id.* 33(a)(1).

151. *Id.* 37.

152. Kakalik et al., *supra* note 147, at 45–46.

Civil Rules *in haec verba*.¹⁵³ The Standing Committee approved our efforts. The Judicial Conference approved. And the Supreme Court promulgated our proposed amendments.¹⁵⁴

I. *My Personal Immortality*

But that was not quite the end of the story on mandatory disclosures in my time as Reporter. Several months after the Court promulgated our proposed rule, the leadership of the ABA suddenly became incensed at the idea of mandatory disclosure,¹⁵⁵ and President Bush expressed his disapproval.¹⁵⁶ So did Justice Scalia.¹⁵⁷ The very idea was said to be an offense against the sacred adversary tradition. To make any voluntary disclosure to an adversary was seen as a betrayal of the client. The House Judiciary Committee unanimously recommended that Congress veto the amendment to Rule 26.¹⁵⁸ And the House of Representatives did just that; it overwhelmingly disapproved of our rule as promulgated by the Court and rejected it in a voice vote.¹⁵⁹

But under the Rules Enabling Act, the veto required majority votes of disapproval in both houses. The proposed reform therefore went to the Senate, where the ABA lobbyists had clearly doomed it. But the Senate Judiciary Committee had to disapprove of the rule before sending it to the full Senate—at a time when the committee was on a calendar requiring short meetings with limited debate and

153. See generally Oakley & Coon, *supra* note 35 (classifying certain states as replicators of the federal rules).

154. Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401 (1993).

155. See Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—“Much Ado About Nothing?”*, 46 HASTINGS L.J. 679, 729 (1995) (suggesting that the profession “unleash[ed] a flood of criticism on the disclosure proposal”). There were over three hundred written submissions received from individual practitioners, law firms, scholars, bar associations, plaintiffs’ and defense trial lawyer associations, insurers, public interest groups, federal district judges, and industry. Of them, all but approximately a dozen opposed the new rule. Griffin B. Bell, Chilton Davis Varner & Hugh Q. Gottschalk, *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 28 (1992).

156. Exec. Order No. 12,778, 3 C.F.R. 359 (1992).

157. Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 507, 510–12 (1983) (Scalia, J., dissenting).

158. Alfred W. Cortese Jr. & Kathleen L. Blaner, *A Change in the Rules Draws Fire: Litigators Fight to Stop Mandatory Disclosure*, NAT’L L.J., Oct. 18, 1993, at 25; see also 28 U.S.C. § 2074(a) (2006) (establishing the process for submitting rules to Congress).

159. 139 CONG. REC. 27,271–74 (1993); see also Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 309 (1994). Though the totals from the voice vote are not recorded, I recall this vote as being unanimous against the rule.

unanimity to send a proposal to the full Senate. The Subcommittee on Courts and Administrative Practice conducted a brief hearing, at which Judge Pointer was allowed five minutes.¹⁶⁰ Unanimity was denied when Senator Howard Metzenbaum of Ohio raised his hand to insist on a full hearing in the Judiciary Committee on the issues presented.¹⁶¹ But there could be no hearing within the time allowed by the Rules Enabling Act for the congressional veto. So the rule I had the pleasure of drafting became the law of the United States notwithstanding its overwhelming disapproval by the House of Representatives and its almost certain disapproval by the Senate. I do not expect that anyone will ever equal my achievement in writing a law that a unanimous (as I recall the voice vote) house of Congress could not prevent from becoming the law of the United States. And “my” rule abides.¹⁶² Perhaps the event demonstrates the frailties of democratic civil rulemaking.

J. The Continuing Dispute over Disclosure Requirements

Indeed, it may now be concluded that the adversary tradition has, for the moment, survived and that the disclosures required by Rule 26 may have reduced costs in some cases. But the disclosures have been no magic bullet¹⁶³ and have drawn some criticism of their

160. See *Proposed Amendments to the Federal Rules of Civil Procedure: Hearing Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary*, 103d Cong. 2–5 (1993). This hearing occurred prior to the House vote.

161. Shilpa Shah, Note, *An Application of Federal Rule of Civil Procedure 26(a)(1) to Section 1983 Actions: Does Rule 26(a)(1) Violate the Rules Enabling Act?*, 43 CLEV. ST. L. REV. 115, 120 (1995) (citing Randall Samborn, *New Discovery Rules Take Effect*, NAT’L L.J., Dec. 6, 1993, at 3).

162. Several authors offered contemporaneous comment. See Virginia E. Hench, *Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Discovery Rules Amendments and the Just, Speedy and Inexpensive Determination of Every Action*, 67 TEMP. L. REV. 179, 207 (1994) (suggesting that a different approach to pretrial procedure is needed “to avoid endless rounds of ‘satellite proceedings,’ and the constant potential for attorney-client conflict” (footnote omitted)); Robert E. Oliphant, *Four Years of Experience with Rule 26(a)(1): The Rule is Alive and Well*, 24 WM. MITCHELL L. REV. 323, 341–44 (1998) (reviewing the implementation of Rule 26(a)(1)); Bedora A. Sheronick, Note, *Rock, Scissors, Paper: The Federal Rule 26(a)(1) “Gamble” in Iowa*, 80 IOWA L. REV. 363, 366 (1995) (arguing that the amended Rule 26 may be one of modern civil procedure’s “most significant innovations” (quoting *Hickman v. Taylor*, 329 U.S. 495, 500 (1947))). See generally Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994).

163. TERENCE DUNWORTH & JAMES S. KAKALIK, RAND INST. FOR CIVIL JUSTICE, *EVALUATING THE CIVIL JUSTICE REFORM ACT OF 1990* (1995), http://www.rand.org/pubs/research_briefs/RB9022 (“Overall, implicit policy changes may be as important as explicit ones.

own.¹⁶⁴ And the movement led in 1992 by Vice President Quayle for deregulation or tort reform abides in the expressions of politicians and other leaders who share a lack of interest in real data of the sort assembled by RAND or the Federal Judicial Center.¹⁶⁵ So, agitation for reform of the discovery rules continues.¹⁶⁶ Reforms of discovery imposed since the enactment of the Civil Justice Reform Act have done little to abate that political movement that wishes to reduce the legal expenses of businesses and the effectiveness of private enforcement of laws that they would prefer not to obey. With their objective in mind, I have elsewhere suggested that the fee-shifting scheme advocated by the Quayle Commission be adopted but applied only to discovery motions, in which context it might serve to deter needless squabbling over the limits of the right to conduct private investigations of claims and defenses.¹⁶⁷ That proposal has not been

Many judges and lawyers have commented in interviews that the process of implementing the pilot plans has raised the consciousness of judicial officers, clerks, and lawyers, with resulting subtle changes in how things are done—perhaps fewer continuances, more attention to the cost of discovery, more effort to settle cases.”); JAMES S. KAKALIK, TERENCE DUNWORTH, LAURAL A. HILL, DANIEL MCCAFFREY, MARIAN OSHIRO, NICHOLAS M. PACE & MARY E. VAIANA, RAND INST. FOR CIVIL JUSTICE, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 61–65 (1996); WILLIAM W. SCHWARZER, LYNN H. PASAHOV & JAMES B. LEWIS, CIVIL DISCOVERY AND MANDATORY DISCLOSURE: A GUIDE TO EFFICIENT PRACTICE 6 (2d ed. 1994) (“The objections to [the disclosure] amendments expressed before they went into effect appear to have proved unfounded by the experience under them”); Edward D. Cavanagh, *The Civil Justice Reform Act of 1990: Requiescat in Pace*, 173 F.R.D. 565, 569 (1997) (“All in all, the CJRA was an unfortunate rush to judgment on the problems afflicting the federal judicial system and how to solve them.”); Steven Flanders, *The Unanswered Question: Research on the Effects of the Civil Justice Reform Act of 1990 Tells Little About How to Mitigate Excessive Cost or Delay*, 82 JUDICATURE 55 (1998); Elizabeth Plapinger, *Rand Study of Civil Justice Reform Act Sparks Debate*, NAT’L L.J., Mar. 24, 1997, at B18 (“Most controversial . . . are the report’s findings or lack of findings on ADR’s impact on cost and delay.”).

164. Bell et al., *supra* note 155, at 2 (“The criticism of the civil justice system has reached a crescendo in recent years.”); Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the New Discovery Rules*, 84 GEO. L.J. 61, 82–88 (1995) (arguing that the mandatory disclosure rule is unlikely to have an effect on discovery costs).

165. For an apt account, see Miller, *supra* note 43.

166. Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 520–21 (1998) (explaining the reexamination of the discovery rules to determine whether full disclosure is too expensive and if any changes could be made to make the system more efficient); Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery “Reform,”* 64 LAW & CONTEMP. PROBS. 197, 225–28 (Spring–Summer 2001) (“Additional study, experimentation, and reflection can be tolerated by the court system and may prove beneficial in the long run.”).

167. See Carrington, *supra* note 116, at 66 (suggesting the use of fee shifting when parties engage in discovery litigation).

adopted—nor even, so far as I can tell, advanced by any business interests.

V. RULE 4 AND SERVICE OF PROCESS ABROAD

A. *Formalities of Service*

Congress tinkered with Rule 4 in 1983,¹⁶⁸ facilitating service of summons by eliminating the traditional need to employ a U.S. Marshal and by adopting a provision shifting the costs of service to a defendant who refused to waive the needless and costly formality of personal service. State courts had previously adopted both schemes, and they seemed to be useful methods of reducing legal costs.¹⁶⁹ The Act was a reminder that Congress is and should be ultimately in charge of making our national law.

But in that enactment, Congress seemingly neglected to provide that the device of requested waiver of formal service of process could be employed when the defendant to be served was outside the state in which the court was sitting.¹⁷⁰ The Advisory Committee perceived a need to correct that apparent oversight and also to amend Rule 4 to reduce a hazard imposed on parties suing the United States or its officers. That hazard arose when a court of appeals held that a party serving a summons on fewer than all of many necessary parties to such an action within the time allowed could not be given additional time to correct the oversight.¹⁷¹ The Advisory Committee felt that this was a needless trap. Maybe, we then thought, one summons served on the United States should suffice. I recall suggesting that each post office should have a “P.O. Box A: Sue the U.S.” located next to P.O. Box 1, where a summons might be served. But we were assured by Attorney General Dick Thornburgh that the government absolutely

168. Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, § 2, 96 Stat. 2527, 2527 (codified at 28 U.S.C. app. (2006)).

169. See 1 ROBERT C. CASAD, *JURISDICTION IN CIVIL ACTIONS* 5-26 to 5-33 (2d ed. 1991) (discussing the process provided in the Civil Rules for service by mail and similar approaches adopted by the states).

170. Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1, 7 (1988) (claiming that Congress has the power to provide for service of process anywhere in the United States even though “it had not exercised [that power] statutorily”).

171. E.g., *Whale v. United States*, 792 F.2d 951, 954 (9th Cir. 1986) (refusing to overturn the district court’s denial of appellant’s Rule 60(b) motion because the appellant’s counsel’s failure to personally serve the U.S. attorney was due to counsel’s own misreading of the rules and therefore not justifiable).

required multiple notices of any suit filed against it or its officers. We did nevertheless manage some easing of suits against the government by adding Rule 4(i)(4) to extend the time for correcting a defect in service of process on the United States.

B. The Hague Convention and Formalities of Service Abroad

The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Convention) posed a greater challenge to the Advisory Committee's work on Rule 4.¹⁷² It had been signed in 1965;¹⁷³ by 1985 it had been ratified by the United States and many other nations.¹⁷⁴ Rule 4 needed to be amended to accommodate the aim of that Hague Convention to facilitate transnational litigation and to address the issues presented by service of process outside the United States. Among its complexities, the Hague Convention obligated signatory nations to establish a "Central Authority" that would assume responsibility for delivery of the requisite documents to defendants—a role not unlike that of the U.S. Marshals until Congress relieved them of it in 1983. (And a role that bears some resemblance to the idea of "P.O. Box A: Sue U.S.!"!)

As the Advisory Committee considered transnational service of process, it also noted that the long arm of the federal courts in claims arising under federal law against defendants served outside the United States was not as long as recent due process decisions of the Supreme Court¹⁷⁵ suggested that it might be. Indeed, the Court had explicitly invited rulemakers to consider whether the federal arm should be extended to secure less-expensive and more-effective

172. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (entered into force Feb. 10, 1969).

173. On the role of the United States in its drafting and promotion, see generally Philip W. Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J. 650 (1965); Stephen F. Downs, Note, *The Effect of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters*, 2 CORNELL INT'L L.J. 125 (1969).

174. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch.7.A, intro. note (1986) ("As of 1987, 25 states were parties to the Hague Service Convention . . .").

175. *E.g.*, *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 223 (2d Cir. 1963) ("There thus exists an overwhelming consensus that the amenability of a foreign corporation to suit in a federal court in a diversity action is determined in accordance with the law of the state where the court sits . . .").

enforcement of our national law against foreign firms whose practices risked harms to our citizens.¹⁷⁶ The Advisory Committee resolved that a federal plaintiff should be allowed to invoke personal jurisdiction over a defendant having “minimum contacts” with the United States, even though the contacts with any particular state might be too modest to reach the minimum standard to sustain personal jurisdiction in any state court. With these numerous thoughts in mind, the Advisory Committee proceeded with its reconsideration of Rule 4.¹⁷⁷

With Congress’s cost-saving device in mind, the Advisory Committee was attracted to the prospect of avoiding the costly intricacies of compliance with the Hague Convention by asking the defendant to waive the Central Authority procedure in a case in which that procedure was not needed to provide the requisite information to the defendant. The cost savings could be much more significant in international than in domestic cases, given that service of process through a Central Authority requires that the complaint and summons be translated into the language of its officers—even if the foreign defendant to be served is entirely fluent in English—and is also likely to result in substantial delay, sometimes intentionally imposed by governments protective of defendants in their territories. Many international firms doing business in the United States have no practical need for the Hague Convention’s formalities.¹⁷⁸ Toyota does not need to see a complaint against it in Japanese. The Advisory Committee discussed the proposal with officers of the Department of Justice and at informal academic gatherings in Europe. We could see no reasonable objection for not applying the requested waiver-of-service provision to defendants outside the United States, especially when a costly, dilatory, and unnecessary translation would be needed.

The Advisory Committee therefore reorganized Rule 4 to address all these purposes, published our draft for comment, and

176. *Omni Capital Int’l v. Rudolph Wolff & Co.*, 484 U.S. 97, 109–10 (1987); see also J. Dickson Phillips & Paul D. Carrington, *Reflections on the Interface of Treaties and Rules of Procedure: Time for Federal Long-Arm Legislation*, 57 LAW & CONTEMP. PROBS. 153, 154 (Summer 1994) (calling for Congress to pass federal long-arm legislation).

177. See generally Joseph F. Weis, Jr., *The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity*, 50 U. PITT. L. REV. 903 (1989) (tracing the development of Rule 4 after the Hague Conventions).

178. E.g., *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 173–74 (8th Cir. 1989) (permitting the plaintiff to serve the defendant based on the procedure in Article 10 rather than through the Central Authority as outlined in Articles 2 and 6).

heard no objections. The Standing Committee and the Judicial Conference then unanimously approved the proposal.

C. Revision by the Court at the Suggestion of the British Embassy

But our proposal was quietly revised by our committee chair, Judge Pointer, at the behest of the Supreme Court, to insert language making the cost-shifting waiver-of-service provision inapplicable to a defendant to be served outside the United States.¹⁷⁹ Chief Justice Rehnquist and the Judicial Conference directed the revision in response to the protest of the British Embassy. The embassy, presumably at the request of officials of the European Union, had retained Erwin Griswold, a former solicitor general of the United States, to inform the Court and the State Department that our proposal was offensive to signatories to the Hague Convention. No public consideration of this issue was ever conducted. So much for the new practice of transparency required by the revised Rules Enabling Act! It seemed to me at the time that the international political question raised by the British Embassy was one best resolved by Congress on the advice of the executive.

Just as the House of Representatives responded to the lobbying of the ABA on Rule 26 without serious consideration of the political issue it addressed, the Court and the Judicial Conference under the leadership of Chief Justice Rehnquist responded to lobbying by the British Embassy on Rule 4 without public deliberation or consideration of the merits of the issue presented. I continue to believe that the cost-shifting provision should be applied to a foreign defendant who needlessly requires an American plaintiff to procure a translation of a summons and complaint when the defendant is fully fluent in English and is engaged in activities in the United States that give rise to the complaint. I see no conflict with the Hague Convention, whose aims are essentially those of Rule 1. I urge the Advisory Committee to try once more to get it right.¹⁸⁰

179. See Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 LAW & CONTEMP. PROBS. 103, 143–48 (Summer 1994) (describing how U.S. rulemakers have gone about changing Civil Rules that affect international litigation).

180. See Joseph F. Weis, Jr., *Service by Mail—Is the Stamp of Approval from the Hague Convention Always Enough?*, 57 LAW & CONTEMP. PROBS. 165, 177 (Summer 1994) (arguing that the Civil Rules should focus on the process of service providing notice for international defendants rather than on formalities). But see Doug Rendleman, *Comment on Judge Joseph F. Weis, Jr., Service by Mail—Is the Stamp of Approval from the Hague Convention Always*

VI. THE HAGUE EVIDENCE CONVENTION

A. *The Aérospatiale Case*

The usual discovery rules were also applicable to international litigation. The Advisory Committee was therefore obliged to consider the Hague Evidence Convention bearing on the taking of evidence abroad.¹⁸¹ The relation of that treaty to Rule 26 emerged as a problem in 1987 in the 5–4 division of the Supreme Court in *Société Nationale Industrielle Aérospatiale v. United States District Court*.¹⁸² In that case, the French manufacturers of an allegedly defective airplane resisted a Rule 34 request for documents bearing on the airplane's design by insisting that the plaintiffs use the formalities provided by the Convention. The Convention does impose on the signing nations an obligation to cooperate with letters of request addressed not to the party from whom evidence is sought but rather to its government, with the expectation that the government will in due course secure and transmit the evidence. The Court unanimously rejected the defendants' contention that the plaintiffs seeking documents located in France were required to pursue them by means of the Letter of Request procedure. The majority cautioned district courts to "exercise special vigilance to protect foreign litigants from . . . unduly burdensome . . . discovery,"¹⁸³ but left the Convention available as an alternate optional means of pursuing information or evidence.¹⁸⁴

Four Justices dissented from "[t]he Court's view of this country's international obligations."¹⁸⁵ They urged that some deference be shown to foreign sovereignty and the international agreement, and that the Letter of Request procedure therefore be used as a first resort when it is available and adequate to the specific task.

Enough?, 57 LAW & CONTEMP. PROBS. 179, 181 (Summer 1994) (arguing that the Civil Rules should respect the sovereignty of other nations and their rules of procedure).

181. Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, opened for signature Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 (entered into force Oct. 7, 1972). See generally Lawrence Collins, *The Hague Evidence Convention and Discovery: A Serious Understanding?*, 35 INT'L & COMP. L.Q. 765 (1986) (arguing that the Hague Convention has been misconceived by U.S. courts and that the Convention applies to evidence at trial but not to rules of discovery).

182. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522 (1987).

183. *Id.* at 546.

184. *Id.* at 544.

185. *Id.* at 548 (Blackmun, J., dissenting).

B. An Effort to Accommodate the Court's Opinion and the Convention in Rule 26

The issue presented by the two opinions seemed to the Advisory Committee to be worthy of broader public consideration. We published a draft of an amendment that would require a first resort to the Letter of Request procedure if available and suited to the task at hand.¹⁸⁶ After considering the reactions to that tentative draft, the Advisory Committee decided instead to express the opinion of the Court in the text of the rule, including a reference to the Letter of Request procedure as an option. The Advisory Committee's purpose was, as with the Rule 38 proposal, to assure, if possible, that the Civil Rules as published accurately expressed the governing law.

After the Advisory Committee sent this proposal to the Court, the United Kingdom voiced an objection, and the Court remanded the matter to the Advisory Committee. When the Advisory Committee, upon reconsideration, again resolved that the rule should be amended to conform to the rule expressed by the Court, the Department of State joined in expressing disapproval, so the Judicial Conference laid the matter to rest.¹⁸⁷ The majority opinion remains the law, and there is still no reference to the Hague Evidence Convention in the Civil Rules.¹⁸⁸ It seems unlikely that many American litigants have been constrained from discovery by courts concerned about the need to exhibit respect for foreign governments.¹⁸⁹

VII. RULE 11 SANCTIONS

The Advisory Committee's first substantial response to business interests' rising complaints concerning frivolous claims and excessive discovery had come in the 1983 amendments to Rule 11. As previously noted, those amendments served to permit and encourage

186. Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure, 127 F.R.D. 237, 318 (1989) (proposing a method of requesting information during litigation involving international parties).

187. Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 515 (1993).

188. For a contemporaneous assessment of the results, see generally Gary B. Born, *The Hague Evidence Convention Revisited: Reflections on Its Role in U.S. Civil Procedure*, 57 LAW & CONTEMP. PROBS. 77 (Summer 1994).

189. See HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS 198-204 (2008) (discussing how American courts often feel unrestrained by foreign rules of discovery).

the imposition of monetary sanctions on lawyers responsible for asserting meritless motions, claims, and defenses.¹⁹⁰ The revision was well drafted and—though not entirely free of controversy—won much approval at the time of its promulgation. Like many others, I thought they had it about right. It did apparently have the effect of causing some lawyers to do a bit more homework before filing a claim or motion in federal court.¹⁹¹

A. Abuses of Rule 11

Yet, although many lawyers told the American Judicature Society that they had counseled a client not to file suit in light of Rule 11, the impact on actual filings was not evident.¹⁹² And the increasingly frequent resort to Rule 11 begot a substantial and adverse reaction from members of the bar. The issues Rule 11 presented remained at the top of the Advisory Committee's agenda for at least four years. Among the complaints were that the newly revised rule (1) gave rise to a new industry of Rule 11 motion practice adding to cost and delay; (2) stimulated incivility between lawyers; (3) was usually aimed at plaintiff's counsel, leaving defense counsel unrestrained in the assertion of unfounded denials; and (4) encouraged judges to indulge their occasional personal animus toward individual lawyers, sometimes by belated sua sponte rulings coming after a dispute seemed to have been resolved.¹⁹³ Another

190. Federal Rules of Civil Procedure, 97 F.R.D. 165, 167–68 (1983).

191. See generally AMERICAN JUDICATURE SOCIETY, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11*, at 68–72 (Stephen B. Burbank ed., 1989) (discussing the impact of the changes to Rule 11 on civil rights plaintiffs); N.Y. STATE BAR COMM. ON FED. COURTS, *SANCTIONS & ATTORNEYS' FEES* 12 (1987); THOMAS E. WILLGING, *FED. JUDICIAL CTR., THE RULE 11 SANCTIONING PROCESS* 158–59 (1988) (describing how changes to Rule 11 had impacted lawyers' approach to pleadings and motions).

192. See generally ELIZABETH C. WIGGINS, THOMAS WILLGING & DONNA STIENSTRA, *FJC RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES* (1991) (providing an overview of the application of Rule 11 in federal courts).

193. See Paul D. Carrington & Andrew Wasson, *A Reflection on Rulemaking: The Rule 11 Experience*, 37 LOY. L.A. L. REV. 563, 566 (2004); Herbert Kritzer, Lawrence Marshall & Frances K. Zemans, *Rule 11: Moving Beyond the Cosmic Anecdote*, 75 JUDICATURE 259, 269 (1992); William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1013 (1988); Gerald Solovy & Laura A. Kaster, *Rule 11: Framework for Debate*, 61 MISS. L.J. 1, 1 (1991).

complaint heard was that the rule was deterring private enforcement of public law, at least in the field of antitrust law.¹⁹⁴

A Third Circuit task force, organized by the American Judicature Society and served by Professor Stephen Burbank, voiced many of these concerns.¹⁹⁵ Perhaps in part because of Congressman Kastenmeier's recent revisions to the Rules Enabling Act, the Advisory Committee sought public comments on the efficacy of Rule 11, with ten specific questions posed for response.¹⁹⁶ The Advisory Committee also, perhaps for the first time, specifically requested that the Administrative Office gather data on the effects of the Rule. No fewer than three books were published by eminent authors reporting the emerging case law to the lawyers caught in Rule 11's toils.¹⁹⁷ Numerous hearings in diverse locations were conducted to hear the views of lawyers and judges who had used the Rule. Their responses were not reassuring. Not only were hostility levels elevated, but lawyers were routinely asking judges to consider sanctions to punish many, and perhaps most, lawyers whose motions they had denied.¹⁹⁸ Lawyers were making Rule 11 motions to sanction Rule 11 motions. And there was reason to believe that sanctions were imposed disproportionately on civil rights plaintiffs.¹⁹⁹

194. Daniel E. Lazaroff, *Rule 11 and Federal Antitrust Litigation*, 67 TUL. L. REV. 1034, 1039 (1993).

195. See generally Stephen B. Burbank, *The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11: An Update*, 19 SETON HALL L. REV. 511 (1989) (providing a summary of the task force's work); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989) (casting the amendment to Rule 11 as part of an effort to bring uniformity and predictability to the enforcement of the Civil Rules and to help cases be adjudicated on the merits).

196. Comm. on Rules of Practice & Procedure, Judicial Conference of the U.S., *Call for Comments*, 131 F.R.D. 335 (1990).

197. GREGORY P. JOSEPH, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* (2d ed. 1994); JEROLD S. SOLOVY & CHARLES M. SHAFFER, JR., *RULE 11 AND OTHER SANCTIONS: NEW ISSUES IN FEDERAL LITIGATION* (1987); GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES* (Richard G. Johnson ed., 3d ed. 2004).

198. See Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1325–38 (1986) (discussing the application of Rule 11 during the first two years after it was amended).

199. See Mark Spiegel, *The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules*, 32 CONN. L. REV. 155, 156 (1999) (suggesting that civil rights cases involve a disproportionate number of Rule 11 motions).

B. Reforming Rule 11

One thought was to fully restore the discretion of the trial judge being asked to impose sanctions on an adversary. It was also suggested that the hostility might be reduced by a safe harbor provision that would require sanctions motions to be made promptly in direct response to the challenged action of counsel, and that a modest time would be allowed for the withdrawal of the challenged motion or allegation if the moving party detected that the sanctions motion might have merit. The Advisory Committee circulated a draft to that effect and received more comments. Hearings were held. We made revisions in response to the comments and recommended a draft to the Standing Committee that included the safe harbor provision and a modest constraint on judicial discretion in the administration of the rule. The Standing Committee debated the draft at length and made further revisions, including the restoration of judicial discretion.²⁰⁰ The draft as revised became law in 1993, over the dissents of Justices Scalia and Thomas, who vigorously protested that the revision was premature and that more trial lawyers needed to be punished.²⁰¹ The factual basis of their opinion was not disclosed; they clearly disregarded the data gathered by the Administrative Office. I could not help but notice that neither was an experienced litigator.

Whether our 1993 revision of Rule 11 was benign I leave to others to say.²⁰² It did for at least a time quell the concern for the civility of the federal legal process. For better or worse, the rule apparently continued to impede the assertion of civil rights claims of employees by contingent fee lawyers reluctant to risk sanctions.²⁰³ It did not succeed in settling the law on sanctions. For example, questions remained about whether the need for a separate motion on

200. For a review of all the changes, see generally Georgene M. Vairo, *The New Rule 11: Past as Prologue?*, 28 LOY. L.A. L. REV. 39 (1994).

201. Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 507–10 (1993) (Scalia, J., dissenting).

202. More tinkering would be needed. See Maureen N. Armour, *Practice Makes Perfect: Judicial Discretion and the 1993 Amendments to Rule 11*, 24 HOFSTRA L. REV. 677, 777–81 (1996) (proposing a method to make the enforcement of Rule 11 more predictable and consistent). A later assessment is Margaret L. Sanner & Carl Tobias, *Rule 11 and Rule Revision*, 37 LOY. L.A. L. REV. 573 (2004), which argues that although the 1993 amendments seem to have corrected the problems with the 1983 amendments, “the experience with the 1983 amendment may have undermined confidence in the rule revision process of judges, counsel and litigants.” *Id.* at 574.

203. For thoughtful consideration of the issue, see generally Spiegel, *supra* note 199.

sanctions was indispensable and whether the safe harbor provision was to be strictly enforced.²⁰⁴

C. Inherent Judicial Power

And it did not calm the Justices who had in 1991 chosen to disregard the constraining text of Rule 11 to hold, over the dissent of Justice Scalia and others, that federal district judges have *inherent* power to punish lawyers and their clients for persisting in the presentation of a frivolous—indeed fraudulent—defense, sometimes in the face of orders of the court.²⁰⁵ The Court observed that the conduct to be punished in the case presented included much conduct not reached by Rule 11 because it was not reflected in pleadings or motions, nor was it entirely within reach of the contempt power. The Court concluded that neither Rule 11 nor the statute forbidding lawyers to engage in vexatious behavior²⁰⁶ was applicable to much of the misconduct, but that this lack of explicit authority should not preclude a court from doing whatever was necessary to prevent abuse.²⁰⁷ The Court urged judges to use Rule 11 when applicable but not to be constrained by its limitation in circumstances in which lawyers needed to be punished.²⁰⁸ In so holding, the Court relied in part on its earlier decision²⁰⁹ upholding the power of the district court to dismiss a civil claim for failure to prosecute even though the defendant had made no motion to dismiss, notwithstanding the explicit language of Rule 41(b) requiring such a motion as a precondition to dismissal. Implicit in the Court's holding was the

204. See Danielle Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1, 42–49 (2002) (discussing the split in the federal courts of appeal over the safe harbor provisions).

205. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991). Chief Justice Rehnquist and Justices Kennedy and Souter dissented from the Court's decision, *id.* at 60 (Kennedy, J., dissenting), alongside a separate dissent from Justice Scalia, *id.* at 58 (Scalia, J., dissenting).

206. 28 U.S.C. § 1927 (2006).

207. *Chambers*, 501 U.S. at 50 (“But if in the informed discretion of the court, neither the statute nor the Rules are up to the task [of sanctioning an attorney for bad conduct], the court may safely rely on its own inherent power.”).

208. *Id.*

209. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962) (“The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an ‘inherent power,’ governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”).

suggestion that Rule 11 might perhaps be deleted as an unnecessary impediment to judges seeking to do the right thing.

VIII. THE SUPREME COURT'S ROLE AS PROCEDURAL LAWMAKER: RULES 56 AND 8

A. *Rule 56: The 1986 Trilogy*

The relation of the rulemakers to the Supreme Court was of greatest concern in the Advisory Committee's consideration of Rule 56. The concern was aroused by a trilogy of cases handed down by the Supreme Court in 1986.²¹⁰ The Advisory Committee viewed those decisions as revising the rule to permit district judges to render summary judgments more freely than the Court's previous interpretations of the rule's text seemed to allow—and, in many minds,²¹¹ including mine, more freely than the text of the rule could reasonably be said to intend. The trilogy proved to be a foretaste of another, even more radical, revision of the Civil Rules that the Court would fashion in 2007²¹² and 2009.²¹³

Rule 56, governing summary judgment, had been promulgated in its original form in 1938 as an adoption of a procedure used in

210. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

211. See Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 74 (1990) (arguing that the costs of the new summary judgment standard will outweigh the benefits); Miller, *supra* note 43, at 1073–74 (noting that an expansion of summary judgment “not only would be unfortunate, but would be completely inconsistent with the philosophy and principles of the Federal Rules”); Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L.J. 53, 83 (1988) (claiming that the standard for admissibility in summary judgment proceedings “has no support in Rule 56”); D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 35 (1988) (arguing that the new summary judgment standard favors defendants over plaintiffs). See generally Steven A. Childress, *A New Era for Summary Judgments*, 116 F.R.D. 183 (1987) (arguing that the new Supreme Court decisions will lead to an increase in the number of summary judgment motions that are granted); Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change?*, 63 NOTRE DAME L. REV. 770 (1988) (discussing the impact of *Anderson*, *Matsushita*, and *Celotex* on how courts should approach summary judgment motions).

212. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Edward Cavanagh argues that in *Twombly* “the Supreme Court changed its tune dramatically” on pleading requirements. Edward D. Cavanagh, *Twombly, The Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN'S L. REV. 877, 878 (2008).

213. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

England for a half century and in numerous states.²¹⁴ Its aim was to enable the trial judge to spare the court and the parties the cost of a trial when its outcome was certain. A classic 1940 interpretation said that “[i]ts purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial.”²¹⁵ The aim was to inquire before trial, but after discovery, whether such evidence existed. The moving party assumed the burden “to show that there is no genuine issue as to any material issue of fact.”²¹⁶

The 1986 opinions of the Court rewriting Rule 56 have been more frequently cited “than any judicial decisions in the history of American jurisprudence.”²¹⁷ Respected scholars saw the opinions as having the effect of reviving the fact-pleading standards that were the primary feature of the nineteenth-century codes that had often led to decisions based on perceived flaws in the texts of complaints and answers.²¹⁸

B. *Revising Rule 56?*

The Advisory Committee believed that, among other effects, the trilogy’s widening of the summary judgment procedure rendered Rule 56 misleading. It questioned whether lawyers could retain faith in the text crafted through the rulemaking process established by Congress. To many, in deciding to depart from the text of the Rule, the Court seemed to have manifested a measure of disrespect for a rulemaking

214. See John A. Bauman, *The Evolution of the Summary Judgment Procedure: An Essay Commemorating the Centennial Anniversary of Keating’s Act*, 31 IND. L.J. 329, 344 (1956) (asserting that early summary judgment procedure in England reached “its ultimate extension . . . in the United States by the adoption of Federal Rule 56”); Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 423 (1929) (examining “the rules and decisions concerning summary procedure in the jurisdictions where it ha[d] already been adopted” by 1929, which included England and several American states such as New Jersey, New York, and Michigan).

215. *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940).

216. FED. R. CIV. P. 56(c)(2).

217. Adam N. Steinman, *An Ounce of Prevention: Solving Some Unforeseen Problems with the Proposed Amendments to Rule 56 and the Federal Summary Judgment Process*, 103 NW. U. L. REV. COLLOQUY 230, 230 (2008), <http://www.law.northwestern.edu/lawreview/Colloquy/2008/45/LRColl2008n45Steinman.pdf> (citing Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 143 (2006)).

218. Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 435, 437 (1986); see also Miller, *supra* note 43, at 1016–19 (discussing historical summary-judgment procedures and suggesting that Rule 56 was adopted to balance out the new generous pleading and joinder requirements, which would not sufficiently terminate frivolous claims before trial).

process that had been designed to assure the well-informed disinterest of those responsible for the creation and revision of transsubstantive procedural rules. Because the extension of the summary judgment rule diminished the prospects of many kinds of plaintiffs,²¹⁹ the three decisions together could also be seen to reflect a substantive political agenda to assist the contemporaneous deregulation movement.

Among my tasks in my first years as Reporter was considering how to rewrite the pertinent language of Rule 56 to make it consistent with the three Supreme Court decisions. The Advisory Committee was moved to accept the Court's dictation, and I tried to draft a rule more consistent with the Court's opinions. I recall that the Advisory Committee held one of its meetings in a conference room at the Supreme Court. Chief Justice Rehnquist happened by and expressed interest in our agenda. He warmly approved of the idea of rewriting Rule 56. But he did not stay to help with the task.

The Advisory Committee did, after an extended period of study and reflection, approve a revised draft of Rule 56. In fairness, none of us were sure we had it right. We sought to reconcile the text of the rule with the 1986 trilogy and also to clarify the use of the rule to resolve specific claims or issues even when the whole case could not be summarily resolved.²²⁰

C. *The Decision to Amend Rule 50 but Not Rule 56*

We also tinkered with Rule 50 for the purpose of linking it to the proposed text of Rule 56.²²¹ Our proposal for Rule 50 became law, but our proposal for Rule 56 did not. Although other questions were discussed, the argument that seemed to prevail in the Standing Committee against the revision of Rule 56 was that it would be inappropriate for our committees to trespass on a lawmaking role that the high Court had appropriated for itself. I was not the only person

219. Risinger, *supra* note 211, at 39 (contending that the *Celotex* trilogy "introduced a procedure which is asymmetrical, grossly favoring defendants over plaintiffs no matter which party is the movant").

220. ADVISORY COMM. ON CIVIL RULES, FED. JUDICIAL CONFERENCE OF THE U.S., MEETING OF APRIL 13–15, 1992, MINUTES OF MEETING, *available at* <http://www.uscourts.gov/uscourts/RulesandPolicies/rules/Minutes/CV04-1992-min.pdf>.

221. See Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2109–10 (1989) (observing the "significant relationship between Rule 56 and Rule 50" and detailing the advantages that would result from "uniting the terminology" of the two rules).

present who was resistant to what seemed to be misplaced modesty and deference by those to whom Congress had assigned the role of disinterested drafting of procedural law for its nonpartisan approval.

The premise of the Rules Enabling Act of 1934 that still governs the Judicial Conference is that courts of first instance should be bound to adhere to preexisting procedure rules crafted by the Conference and its committees but subject to Supreme Court approval and congressional acquiescence, just as they are bound to respect and enforce congressional legislation. The Supreme Court seemed to have departed from that premise in the 1986 trilogy; it was seen by many to have rewritten Rule 56 in a moment of judicial activism.²²² The Advisory Committee has in recent times reflected, perhaps at length, on possible revisions of Rule 56, and modest changes are due to take effect in 2010.²²³ But it seems that no substantial changes considered to date by the Advisory Committee can be validated by reference to empirical data gathered by the Federal Judicial Center. Quibbling continues over the auxiliary verbs embedded in the text. Judge Brock Hornby has advanced a worthy suggestion that summary judgment proceedings be made more transparent by requiring public hearings before Article III judges on such motions.²²⁴ Alas, that suggestion may be too radical to gain traction.

D. Twombly: *The Supreme Court Rewrites Rule 8*

If there was doubt that the Court was rewriting the Civil Rules to conform to the political preferences of a majority of the Justices, the doubt was resolved in 2007 and 2009. Its 2007 decision in *Bell Atlantic Corp. v. Twombly*,²²⁵ requiring that pleading be plausible to the judge, rested in part on the fact that the claim was one arising under the federal antitrust law. The majority of the Court expressed skepticism

222. For an in-depth analysis of the term “judicial activism” and its political implications, see generally Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555 (2010).

223. See Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1945 (2009) (“[T]he federal rulemakers are now readying to amend Rule 56, with a projected effective date of December 1, 2010. They would include new procedures requiring parties to state the facts assertedly uncontested and to respond thereto; the rule also would clarify judicial options when a party fails to respond to a motion and would recognize the practice of moving for partial summary judgment.” (footnote omitted)).

224. D. Brock Hornby, *Summary Judgments Without Illusions*, 13 GREEN BAG 2D 273, 284–86 (2010).

225. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

about the virtue of antitrust plaintiffs as a group. This skepticism was apparently sufficient to justify what the Court saw as a more-rigorous application of Rules 8 and 12—namely, a greater readiness to render judgments on the pleadings—to antitrust plaintiffs’ suspect claims.²²⁶ This approach, departing from the aim of transsubstantivity embedded in the 1934 Act,²²⁷ would foreclose wasteful discovery by plaintiffs deemed by the judge to be unlikely to be able to find the requisite evidence of conspiratorial misconduct even by free use of discovery.

The Court in *Twombly* took no notice of the efforts to reform discovery practice in which the Advisory Committee has been engaged since the “judicial case management” reforms of 1983, but relied on Judge Easterbrook’s unfounded 1989 declaration that the Civil Rules are not working.²²⁸ No notice was taken by the Court of the 1993 amendments to the discovery rules with which we had addressed the issues raised by Judge Easterbrook.²²⁹ Given all the reforms in place, Professor Thomas Rowe was moved to observe that “[d]iscovery must be a fearsome Gulliver to require all those strings . . . to tie him down.”²³⁰ Nor did the Court take notice of the mass of data calling into question Judge Easterbrook’s assessment, or of the fact that Lord Harry Woolf of Barnes had in the 1990s studied

226. *Id.* at 557–60 (holding that “something beyond the mere possibility of loss of causation must be alleged, lest a plaintiff with ‘a largely groundless claim’ be allowed to” take up other people’s time (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005))); *see also* Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 549 (“[E]ven if animated by the perceived substantive or procedural needs of antitrust law and litigation, *Twombly*’s choices cannot comfortably be confined to that context by reason of another foundational assumption, one that the Court has emphatically endorsed in the pleading context on more than one occasion. General rules made through the Enabling Act Process can only be changed through that process (or by legislation).” (footnote omitted)).

227. *See supra* notes 86–88 and accompanying text.

228. *See Twombly*, 550 U.S. at 559, 560 n.6.; *supra* note 134.

229. This oversight was promptly noted in Cavanagh, *supra* note 163, at 573–75, but not by the Court. Also unnoticed were reforms of state laws permitting, in limited circumstances, prefiling discovery. *See* Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43, 45–46 (2010) (“[M]any state rules permit presuit discovery, and several do so for the express purpose of drafting a sufficient complaint.”).

230. Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules—and the Extent of Convergence with Civil-Law Judging*, 36 SW. U. L. REV. 191, 202 (2007).

the federal court experience²³¹ before importing the practice of case management into the United Kingdom's Civil Procedure Act 1997.²³²

E. Substance, Not Mere Procedure? Consequences for Antitrust Law Enforcement

The Court's opinion in *Twombly* also showed surprising disregard for the character of antitrust law that led to a contrary position in 1962, when the Court cautioned that "summary procedures should be used sparingly in complex antitrust litigation in which motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."²³³ That 1962 caution is no less apt in 2010.²³⁴ But whereas the Court in 1962 had seen a duty to interpret the Civil Rules to favor antitrust law enforcement in the setting of a motion to avoid trial, the Court in 2007 saw itself as having a contrary duty to protect business firms from the expense even of enduring the discovery process in an antitrust case if, in a court's intuitive judgment, the claim seemed unlikely to be a winner. Never mind that withholding access to discovery will inevitably prevent some meritorious claims from being heard and will relax business entities' concern for the legal consequences of schemes abusing economic power. Never mind that the European Union is now finding it increasingly important to enhance private enforcement of its competition law.²³⁵

231. See THE RIGHT HONOURABLE THE LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1996).

232. Civil Procedure Act 1997, c. 12 (U.K.); Déirdre Dwyer, *Introduction to THE CIVIL PROCEDURE RULES TEN YEARS ON* 1, 9–14 (Déirdre Dwyer ed., 2009). One commentator has reported that the practice has been less effective than hoped. See Adrian Zuckerman, *Litigation Management under the CPR: A Poorly-Used Management Infrastructure*, in *THE CIVIL PROCEDURE RULES TEN YEARS ON*, *supra*, at 89, 89 (contending that the civil procedure reforms had "failed to achieve the hoped for benefits").

233. *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1961).

234. See Herbert Hovenkamp, *The Pleading Problem in Antitrust Cases and Beyond*, 95 IOWA L. REV. BULL. 55, 66 (2010), http://www.uiowa.edu/~ilr/bulletin/ILRB_95_Hovenkamp.pdf (concluding that although "*Twombly* clearly reached the correct conclusion . . . it could have done less damage to the values of notice pleading stated in the Federal Rules had it focused more narrowly on the mechanisms by which anticompetitive agreements are proven"). Hovenkamp distinguishes geographic market division from parallel pricing: "For all of [the Court's] lengthy discussion about the facts essential to a good complaint, the Supreme Court paid little attention to the difference between price fixing and market division." *Id.* at 62.

235. See Janet L. McDavid & Howard Weber, *E.U. Private Actions*, NAT'L L.J., Apr. 25, 2005, at 13 ("Europe's competition law leaders have indicated that enhancing private enforcement is one of their top priorities.").

F. The Role of the Court in Legislating New Pleading Rules

The opinion of the Court in *Twombly* manifested an even more obvious and drastic disregard of the text of Rule 8 than the disregard of Rule 56 that the Court had manifested in 1986.²³⁶ Rule 8 is the keystone of civil procedure under the 1938 Civil Rules scheme.²³⁷ The Court did not observe the dictum of the late Chief Justice Rehnquist that access to discovery could not be restricted without an amendment of Rules 8 and 9.²³⁸ As recently as 2002, the Court had unanimously confirmed that the only means available for foreclosing discovery was a summary judgment under Rule 56.²³⁹

Professors Kevin Clermont and Stephen Yeazell have forcefully noted a basic problem with the Court's disregard for the text of Rule 8.²⁴⁰ They argue that Rule 8 authorizes prediscovery judgments only when the facts alleged in a complaint are *legally* insufficient: if everything alleged were true, the plaintiff would still lose on the merits.²⁴¹ A test of plausibility empowers judges to terminate a civil case if they are unwilling to consider the possibility that the plaintiff would be able to prove the allegations. This is not to be mistaken for a revival of the nineteenth-century code-pleading requirement that facts be pleaded in sufficient detail to signal the issues to be addressed by evidence presented at trial, although the phrase "heightened fact pleading" sometimes used to describe *Twombly* suggests that connection.²⁴² Because the decision of the district court invoking the heightened pleading standard is a decision on an issue of law and not

236. See cases cited *supra* note 210.

237. WRIGHT, *supra* note 26, at 467.

238. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993).

239. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512–13 (2002); see also *Crawford-El v. Britton*, 523 U.S. 574, 600 (1998) (“[S]ummary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial.”).

240. See Clermont & Yeazell, *supra* note 4 (detailing the Court's recent pleading cases and contending that these cases have destabilized the civil litigation system).

241. See *id.* at 825 (describing the original conception of Rule 8's pleading requirements as giving “fair notice of the pleader's basic contentions” and “pass[ing] most of the screening function from the threshold to the later stages of litigation”).

242. See *id.* at 841–42 (stressing that measuring plausibility “lies entirely in the mind of the beholder” and that beholders “wearing judicial robes ha[ve] precious little interpretive guidance given the measure's novelty in the law”).

on an issue of fact, a likely consequence of *Twombly* will be a significant increase in the rate of civil appeals.²⁴³

Nor did the Court acknowledge that *stare decisis* has long been said to have special value when judges are interpreting legislation,²⁴⁴ a principle perhaps having special application to legal texts the Court itself has promulgated, with the assent of Congress, on the advice of disinterested and well-informed experts.

The Court's disregard of Congress and its own precedents in re-writing antitrust law in *Twombly* was dramatized by its contemporaneous decision, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,²⁴⁵ applying the law enacted by Congress to impose heightened pleading requirements in private securities fraud actions.²⁴⁶ The

243. See Kevin M. Clermont, Three Myths About *Twombly-Iqbal* 9–10 (Jul. 6, 2010) (unpublished manuscript), available at http://papers.ssrn.com/so13/papers.cfm?abstract_id=1613327; see also Jason Bartlett, Comment, *Into the Wild: The Uneven and Self-Defeating Effects of Bell Atlantic v. Twombly*, 24 ST. JOHN'S J. LEGAL COMMENT. 73, 109 (2009) (“Where dismissals are granted with prejudice, the appeals process will sometimes interfere with the pursuit of limiting costs.”). Compare Issacharoff & Lowenstein, *supra* note 211, at 73–75 (contending that the broad concept of summary judgment promulgated by the trilogy will effectively reduce unnecessary litigation, but not without counterbalancing consequences), with D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 875 (2006) (questioning the idea that a robust summary-judgment regime leads to increased litigation efficiency and concluding that more empirical data is needed to make an informed judgment).

244. See *Neal v. United States*, 516 U.S. 284, 295 (1996) (“Once we have determined a statute’s meaning, we adhere to our ruling under the doctrine of *stare decisis* One reason that we give great weight to *stare decisis* in the area of statutory construction is that ‘Congress is free to change this Court’s interpretation of its legislation.’” (quoting *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977))); see also *Hohn v. United States*, 524 U.S. 236, 259 (1998) (Scalia, J., dissenting) (contending that *stare decisis* concerns common to statutory interpretation cases should not be diminished “in the case of a procedural rule”).

245. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007).

246. The Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 and 18 U.S.C.), requires plaintiffs invoking federal securities laws to “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2) (2006). In *Tellabs, Inc.*, Justice Ginsburg, writing for the Court, held:

It does not suffice that a reasonable factfinder plausibly could infer from the complaint’s allegations the requisite state of mind. Rather, to determine whether a complaint’s scienter allegations can survive threshold inspection for sufficiency, a court governed by § 21D(b)(2) must engage in a comparative evaluation; it must consider, not only inferences urged by the plaintiff . . . but also competing inferences rationally drawn from the facts alleged. An inference of fraudulent intent may be plausible, yet less cogent than other, nonculpable explanations for the defendant’s conduct. To qualify as “strong” within the intentment of § 21D(b)(2), we hold, an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.

Tellabs, Inc., 551 U.S. at 314.

Justices could hardly have failed to notice that Congress knows how to impose more rigorous procedural requirements in a substance-specific class of cases and had declined to impose any such requirements on antitrust plaintiffs.

Nor did the Court in *Twombly* observe that its assessment of the plausibility of a plaintiff's allegations cast the Justices, as well as the trial judge, into the factfinding role of the civil jury. Scholars also observed that oversight in an unrelated case in which the Justices viewed the films of an automobile accident to decide for themselves whether there was fault.²⁴⁷ Subsequent viewing of the film by diverse others demonstrated that reasonable minds could differ and that the differences were not without relationship to demographic differences.²⁴⁸ Similarly, the Court in 2010 yielded to the temptation to preempt the discretion of federal trial judges on such questions as whether a television camera might be allowed in a courtroom²⁴⁹ or whether to award an enhanced fee to a civil rights attorney.²⁵⁰

The Court also disregarded the text of Rule 9. That Rule has always modified the basic principle of Rule 8 by setting a heightened standard of pleading for fraud. The 1995 securities law enacted by Congress was in this respect merely an elaboration and reinforcement of Rule 9.²⁵¹ According to the rule, fraud victims should be able to tell us on which bits of disinformation they relied. Professor Spencer has

247. *Scott v. Harris*, 550 U.S. 372, 378–81 (2007) (holding that the court of appeals should have “viewed the facts in the light depicted by the videotape,” which, in the Court’s view, “quite clearly contradict[ed]” the respondent’s claim that the chase created little threat to other motorists or pedestrians).

248. See Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 903–06 (2009) (arguing that in *Scott v. Harris*, 550 U.S. 372 (2007), the Court “invoked brute sense impressions to justify its decision,” yet when the videotape was allowed to speak for itself in an empirical study “what it sa[id] depend[ed] on to whom it [was] speaking”). These authors polled 1,350 citizens who viewed the film. *Id.* at 845. Although a majority drew the same conclusion as the majority of the Court, their reactions were shown to reflect differences of class, race, and party affiliation. *Id.* at 903.

249. See *Hollingsworth v. Perry*, 130 S. Ct. 705, 714–15 (2010) (per curiam).

250. See *Perdue v. Kenny A.*, 130 S. Ct. 1662, 1676 (2010); see also Paul Gewirtz, Op-Ed, *Supreme Court Press*, N.Y. TIMES, July 6, 2010, at A23 (citing *Kenny A.* as an example of “lower profile” judicial activism, which should receive more attention “because it is another important way the current Supreme Court is using its power to shape and restrict government decisions”).

251. See Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 612 (2002) (“The general particularity requirement of the PSLRA was designed to codify Rule 9(b)’s application to securities fraud cases.”).

rightly questioned how there can be yet another specially heightened standard not expressed in Rule 9.²⁵²

G. Substantive Political Consequences

The Court's plausibility standard has posed a serious problem for private enforcers of antitrust law, a body of law that, as enacted in the nineteenth century, depends heavily on private enforcement.²⁵³ Antitrust law requires the antitrust plaintiff to learn what the defendant alone may know. Professor Scott Dodson has aptly described the relationship between the parties as an "information asymmetry,"²⁵⁴ which is just what the discovery rules were promulgated to correct.

And one is also left to wonder what the Court proposes to do with plaintiffs who present as their complaint one of the forms appended to the Civil Rules as models of what is expected of pleaders. Form 11, for example, merely alleges that the defendant negligently drove a motor vehicle into the plaintiff.²⁵⁵ This pleading may not meet the Court's new standard.

H. Next Comes Iqbal

One who shared the politics of procedural lawmakers such as Bentham, Field, Pound, and Clark could hope that *Twombly* was just

252. Spencer, *supra* note 103, at 473–77. The special standard applicable to habeas corpus proceedings under Habeas Rule 2(c) is also notable. *Id.* at 477–78.

253. HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 57–62 (2005); *see also* PHILIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 3.03 (3d ed. 2004) (implying that private enforcement is crucial to antitrust law by noting that treble damages are a statutory "lure" to "energize" private antitrust litigation). *See generally* THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 34–35 (Earl W. Kintner ed., 1978) (stressing that the inclusion of a private right of action in the Sherman Act was intended to deter antitrust violations, and that private litigation has been significant in the development of antitrust case law).

254. Scott Dodson, Essay, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 139 (2007), <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf> (quoting Professor Randy Picker in challenging "the Court's suspicions that the [*Twombly*] pleading standard only will bar cases that have no 'reasonably founded hope' of 'reveal[ing] relevant evidence' in discovery" (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007))). Professor Spencer added that "[w]hen such information is unknown or unknowable from the plaintiff's perspective at the pleading stage, the doctrine is too unforgiving and unaccommodating, leaving plaintiffs with potentially valid claims with no access to the system." A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 36 (2009).

255. FED. R. CIV. P. Form 11.

an antitrust case to be understood as an expression of the Court's ambition to protect business interests from claims brought under a federal law of which the Justices disapprove, and not as an assault on the Civil Rules and the political process by which those laws were made. But the Court's 2009 opinion in *Ashcroft v. Iqbal*²⁵⁶ dissolved that hope.

Iqbal's allegation that the defendants were among the public officials responsible for his harsh treatment when there was no evidence legitimating his arrest as a terrorist in violation of federal law seemed to be, in the Court's view, unworthy of belief and therefore unworthy of investigation through the use of the discovery rules.²⁵⁷ The defendants' qualified immunity as public officials ostensibly doing their duty became, in the Court's opinion, an absolute immunity depriving Iqbal of access to the evidence he would have needed to prove his allegations. The Court worked this deprivation despite the defendants' concession that they would be liable if they had knowledge of the mistreatment of Iqbal and had been deliberately indifferent to his mistreatment. Because a majority of the Justices found Iqbal's allegations implausible, the Court directed the district court to terminate his case prior to factual investigation. This action was inconsistent with the text of Rule 8, which explicitly entitles Iqbal to proceed to prove the facts alleged if they would entitle him to relief.²⁵⁸ The Court's decisions disregarding the text of Rule 8 as interpreted by generations of federal judges make its earlier 1986 disregard of the law of Rule 56 seem restrained in comparison.

I. Up with Deregulation! Down with Private Law Enforcement!

Advocates of deregulation may well celebrate the opinion in *Iqbal* as a major step in the dismantling of the system of private enforcement of public law established in 1938. It is a happy day for Vice President Quayle's Council on Competitiveness, which sought in 1990 to enhance business profits by disabling citizen plaintiffs from enforcing laws made to protect them from the consequences of risky profit seeking. Gregory Katsas, a former assistant attorney general in

256. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

257. *See id.* at 1950–51 (concluding that Iqbal's complaint was deficient under Rule 8 because it had not “‘nudged [his] claims’ of invidious discrimination ‘across the line from conceivable to plausible’” (quoting *Twombly*, 550 U.S. at 570)).

258. FED. R. CIV. P. 8(a).

the George W. Bush administration, has made the astonishing prediction that overruling *Twombly* and *Iqbal* “would threaten to upset pleading rules that have been well-settled for decades, and thereby open the floodgates for what lawyers call ‘fishing expeditions’—intrusive and expensive discovery into implausible and insubstantial claims.”²⁵⁹ In what decades has Mr. Katsas been practicing? Has he read Rule 1?²⁶⁰ Supporters of the opinions have even argued, in a gesture of remarkable incivility, that the Court’s activism in preventing private law enforcement is a response to the need to fight the War on Terror.²⁶¹ Those who respect Rule 8 favor terrorism!

J. Down with the Rulemaking Process?

The Court seems, not in these cases alone, to have lost the self-discipline required to show appropriate respect for the procedural lawmaking system Congress established in 1934. And the Court has not observed the principle of self-restraint in respecting the work of the Judicial Conference that it had voiced as recently as 1999.²⁶² That principle is now one of convenience to the Court.²⁶³ A majority of the Justices seem unaware of their duty to obey and enforce the law made by the humble rulemaking process. As Judge Anthony Scirica has recently observed,

259. *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 33 (2009) (statement of Gregory G. Katsas, Former Assistant Att’y Gen., U.S. Dep’t. of Justice).

260. See FED. R. CIV. P. 1 (“[The Rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”).

261. See William McGurn, *Terror by Trial Lawyer*, WALL ST. J., Dec. 7, 2009, at A17 (speculating that a legislative proposal to relax pleading standards in response to *Iqbal* might encourage captured al Qaeda operatives to “go on discovery expeditions against, say, Gen. David Petraeus or Defense Secretary Robert Gates,” potentially diminishing “the ability of these men to prosecute the war”).

262. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999) (“The nub of our position is that we are bound to follow Rule 23 as we understood it upon its adoption, and that we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act.”).

263. The Court has recently expressed deference to the statutory rulemaking process to consider fashioning a new rule governing the appealability of discovery orders. See *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 609 (2009) (citing rulemaking as “the preferred means for determining whether and when prejudgment orders should be immediately appealable”). Professor Scott Dodson rightly characterized this as ironic. See Melinda Hanson, *Order to Disclose Privileged Material Is Not Subject to Interlocutory Review*, 78 U.S.L.W. 1345, 1346 (2009).

The [1934] Act was a brilliant solution to the making of procedural law. Described as a treaty between the legislative and judicial branches, it provides a dispassionate, neutral forum that allows procedural law to be written in a deliberate and thoughtful manner. Key members of the Executive Branch (such as the Deputy Attorney General and the Solicitor General) have seats on the Rules Committees. The openness mandated by Congress invites public comment, and new rules are enacted only after approval by the Judicial Conference, adoption by the Supreme Court, and after a six-month interval while Congress considers whether to permit the rules to become law. All of this ensures the rigorous scrutiny and public review essential to establish the credibility and legitimacy of the rulemaking process.²⁶⁴

The Court visibly lacks sufficient deference for the other branches of the national government or for the Judicial Conference of the United States to observe such a treaty. Indeed, that the Advisory Committee was fully aware of Judge Easterbrook's views and had decided that the concerns did not justify revision of Rule 8 was apparently not a matter of concern to the Court. Perhaps their lack of trial and legislative experience has interfered with the Justices' ability to conceptualize the effects of their rulings on actual cases. Other recent instances indicate the Justices' diminished regard for subordinate judges and humble jurors selected to assess the credibility of evidence.²⁶⁵ Still others confirm the Court's lack of deference to Congress and the legislative process.²⁶⁶

264. *To Speak with One Clear Voice: The Executive Committee's Role in the Judiciary*, THIRD BRANCH, Dec. 2009, at 1, 11 (interviewing Chief Judge Anthony J. Scirica, Chair, Executive Committee of the Judicial Conference of the United States); see also Stempel, *supra* note 29, at 184 ("When rulemaking proceeds by Enabling Act process rather than judicial fiat, a substantially more diverse cast of characters participates."). But see Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 954 (1999) (arguing for a more-centralized rulemaking process by the courts and objecting to intrusions by Congress and political interest groups, lamenting that "rulemaking today more closely resembles a legislative process . . . than the process of principled deliberation it was originally conceived to be"); Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 943 (2002) ("Anyone who expects rulemaking to produce [monumental] breakthroughs . . . in the new century is going to be disappointed unless dramatic change occurs. . . . At the same time, forecasts of doom seem too dire.").

265. See, e.g., *Scott v. Harris*, 550 U.S. 372, 378–80 (2007) (describing videotape evidence presented to the jury, which the Justices themselves watched); see also Kahan et al., *supra* note 248, at 839–40 (excerpting portions of oral argument in *Scott* in which several Justices discussed their reactions to the videotape with respondent's counsel).

266. See JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* 11 (2002) (arguing that the Court has thwarted Congress's

K. Consequences for State Law Enforcement

Indeed, the Court's revision of Rule 8 treads on the power of state legislatures, too. The celebrated decision in *Erie Railroad Co. v. Tompkins*,²⁶⁷ contemporaneous with the promulgation of the Civil Rules, noticed the problem that federal common law decisions in diversity cases trespassed on state sovereignty. As applied in diversity cases, the Court-created *Twombly-Iqbal* standard will prevent discovery by some plaintiffs seeking to serve the public in their advancement of civil claims arising under state law.²⁶⁸

IX. COMPARE THE FEDERAL ARBITRATION ACT OF 1925

A. Arbitration Law as Written by Congress

The Supreme Court's decisions rewriting the Federal Rules of Civil Procedure—in disregard of the role of other branches of government and to protect business interests from the costs associated with effective private enforcement of public law—should not be viewed in isolation. While the Court was rewriting Rule 56 and then Rule 8 (texts that it had promulgated in 1938) to ease the concerns of business interests, it was pursuing the same political objective in its rewriting of the Federal Arbitration Act of 1925 (FAA).²⁶⁹

legislative authority through an unjustified extension of state immunity); Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 590 (2009) (commenting that it is “no wonder that there is unrest among citizens mindful of the large political role that the Court has come to perform” and proposing to overhaul laws that currently give the Court “virtually absolute control over its docket”).

267. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“[W]hether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.”).

268. *Cf. Estate of Tucker v. Interscope Records, Inc.*, 515 F.3d 1019, 1033 n.14 (9th Cir. 2008) (finding that mere allegations of malicious prosecution were insufficient, without further evidentiary support, to survive a motion for summary judgment in a diversity case). The Washington Supreme Court has explicitly declined to adopt the *Iqbal* standard in reading that state's version of Rule 12(b)(6). *See McCurry v. Chevy Chase Bank, FSB*, 233 P.3d 861, 864 (Wash. 2010) (en banc) (“The appropriate forum for revising the Washington rules is the rule-making process. This process permits policy considerations to be raised, studied, and argued in the legal community and the community at large.” (citation omitted)).

269. Federal Arbitration Act of 1925 (FAA), Pub. L. No. 68-401, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1–16 (2006)); *see also* Paul D. Carrington, *Self-Deregulation, the “National Policy” of the Supreme Court*, 3 NEV. L.J. 259, 264 (2002) (“The instrument of the

Congress passed the FAA to foster arbitration of contract disputes arising between business firms engaged in interstate commerce to reverse a body of federal common law (the body of law overruled and dissolved in 1938 in *Erie Railroad Co. v. Tompkins*) that had denied enforcement in federal courts of arbitration agreements made prior to the existence of the dispute to be arbitrated, often in disregard of the applicable state law of contracts.²⁷⁰ As federal and state laws enacted to serve public regulatory purposes became more numerous, business interests were attracted to arbitration as a means of blunting the force of such laws. Arbitration is not an absolute bar to law enforcement, but the citizen plaintiff must share the cost of the arbitrator, any factual investigation is entirely in the hands of the arbitrator,²⁷¹ and the arbitrator is not accountable for his or her fidelity to the law.²⁷² Firms therefore found it attractive to arbitrate private claims arising under state or federal regulatory laws. With increasing frequency, firms wrote arbitration clauses into the standard form contracts they required workers, consumers, investors, patients, or franchisees to sign.

In 1953, the Court held that an arbitration clause in a brokerage agreement is not binding on a plaintiff seeking recovery under the

Court's mischief has been the Federal Arbitration Act of 1925, a statute re-written by the Court a half-century after its enactment . . .").

270. See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION-NATIONALIZATION-INTERNATIONALIZATION* 122-33 (1992).

271. *E.g.*, 9 U.S.C. § 7 (giving the arbitrator the ability to summon witnesses and to compel attendance); UNIF. ARBITRATION ACT § 7 (2000).

272. Until 2008, it was widely held that an award might be set aside if it exhibited a "manifest disregard of law." *E.g.*, *Kurke v. Oscar Gruss & Son, Inc.*, 454 F.3d 350, 354 (D.C. Cir. 2006) (commenting that "manifest disregard" is "an extremely narrow standard of review"). And it was assumed that a contract could provide for judicial review of fidelity to law. *See, e.g.*, *Gateway Techs., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995) ("When, as here, the parties agree contractually to subject an arbitration award to expanded judicial review, federal arbitration policy demands that the court conduct its review according to the terms of the arbitration contract."). That assumption was laid to rest in *Hall Street Associates v. Mattel, Inc.*, 128 S. Ct. 1396 (2008). There, the Court held that the FAA provides the exclusive statutory grounds for judicial review of arbitration awards and may not be supplemented by contract. *Id.* at 1400; *see also* *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009) ("[T]o the extent that manifest disregard of the law constitutes a nonstatutory ground for vacatur, it is no longer a basis for vacating awards under the FAA."); Tom Ginsburg, *The Arbitrator as Agent: Why Deferential Review Is Not Always Pro-Arbitration* 8-9 (Univ. of Chicago Law Sch., John M. Olin Law & Economics Working Paper No. 502 (2d Series), 2009), available at <http://www.law.uchicago.edu/files/file/502-tg-arbitrator.pdf> (noting that *Hall Street* "explicitly rejects" the position that judges can "expand their monitoring of the arbitrator-agents simply because the party-principals want them to").

Securities Act of 1933.²⁷³ That decision was widely approved and taken to apply to claims advanced to enforce other laws enacted by Congress.²⁷⁴ The Court did not preclude private arbitration between parties reaching agreement to arbitrate an existing dispute, but it was mindful that arbitrators may not be held accountable for their fidelity to legislation invoked by plaintiffs and are not accountable for failing to investigate pertinent facts.

B. The Court Rewrites the Act

In 1984, the Supreme Court for the first time held that the 1925 FAA could be invoked to bar a California state court from enforcing California's Franchise Investment Act, which would have invalidated an arbitration clause in a standard-form franchise agreement.²⁷⁵ And in 1989, the Court explicitly overruled its own 1953 decision to hold

273. *Wilko v. Swan*, 346 U.S. 427, 438 (1953) ("Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the [Securities] Act."), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). The *Wilko* Court relied on language in the Securities Act declaring void any "'stipulation' waiving compliance with any 'provision' of the Securities Act." *Id.* at 434. In reaching its conclusion, the Court appeared to follow the position taken by the Securities and Exchange Commission in its amicus brief. *See* Brief for the SEC, Amicus Curiae at 18, *Wilko*, 346 U.S. 427 (No. 39). The Court and lower courts have adopted similar reasoning in the context of other statutes. *See, e.g.,* *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 264–65 (1949) (per curiam) (holding that contractual clauses limiting the plaintiff's choice of venue in a suit under the Federal Employers' Liability Act were voided by the Act's provisions); *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 828 (2d Cir. 1968) (concluding that the antitrust claims raised by the plaintiff were "inappropriate for arbitration" despite the existence of an arbitration clause). *But see* *Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3, 6–7 (3d Cir. 1943) ("[W]e see nothing in the wording of the Fair Labor Standards Act which precludes arbitration of claims arising under it.").

274. *See, e.g., In re Arbitration Between AAACON Auto Transp., Inc & State Farm Mut. Auto. Ins. Co.*, 537 F.2d 648, 654–55 (2d Cir. 1976) (holding that the Interstate Commerce Act preserved a shipper's right to sue a carrier in any proper forum under that Act, and that the Act therefore voided any contractual limitations on venue); *Am. Safety Equip. Corp.*, 391 F.2d at 828 (declining to consider the plaintiff's antitrust claims as being among those situations in which "Congress has allowed parties to obtain the advantages of arbitration").

275. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) ("In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." (footnote omitted)). The state law in question was CAL. CORP. CODE § 31512. In 1995, the Supreme Court extended its application of the FAA to preempt an Alabama law protecting consumers from mandatory arbitration clauses in standard form contracts. *See Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) ("What states may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful . . .").

that the FAA empowered brokers to compel their investors to arbitrate claims arising under federal securities laws.²⁷⁶ The Court went on to apply the principle to other federal laws.²⁷⁷

An arbitrator might investigate facts in dispute when a citizen seeks to enforce the law enacted for his protection, and the arbitrator might elect to enforce the applicable law, but an arbitrator is also free to choose to do otherwise.²⁷⁸ I have heard that those providing arbitration services offer reassurances that private citizens required to arbitrate win a higher percentage of their cases than in litigation. A possible explanation for that fact, if it is a fact, is that the upfront charge for the cost of arbitration and the absence of the right to discovery deter plaintiffs from filing any but the most assured claims. Indeed, if it were true that plaintiffs win more readily in arbitration, few businesses would write arbitration clauses into their standard form contracts.

Also, arbitration is a private proceeding. One of its attractions to predatory or risk-taking businesses is that it diminishes the likelihood that the success of one claim by a consumer, employee, or investor will encourage others like it. Evidence revealed to an arbitrator remains private. Whereas a public enforcement proceeding serves to alert the general public to the need for regulation and enables the public to measure the usefulness of its legal institutions, secret proceedings conceal from the public not only the risk of the harm at issue but also the awareness that the public interest is being served by the law enforcement efforts of fellow citizens.²⁷⁹

This history of federal arbitration law since the mid-1980s tends to confirm that the Supreme Court's revisions of the Civil Rules have a clearly visible political aim: to protect business firms from

276. See *Rodriguez de Quijas*, 490 U.S. at 484 (“We now conclude that *Wilko* was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions.”). This overruling was foretold in *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987). There, the Court commented that it was “difficult to reconcile *Wilko*’s mistrust of the arbitral process with this Court’s subsequent decisions involving the Arbitration Act. . . . Indeed, most of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims to be nonarbitrable.” *Id.* at 231–32.

277. See, e.g., *Allied Bruce Terminix Cos.*, 513 U.S. at 281.

278. See *supra* notes 271–74.

279. Adriaan Lanni, Note, *Protecting Public Rights in Private Arbitration*, 107 YALE L.J. 1157, 1161 (1999) (arguing that confidential arbitration proceedings pose such “significant dangers” as diminished deterrence, lack of uniformity in industry standards, and stunted development in the law).

unwelcome private law enforcement. Never mind contrary legal texts—whether enacted directly by Congress, promulgated by the Court itself on the advice of the Judicial Conference and with the tacit approval of Congress, or enacted by state legislatures to assure the effective enforcement of state law.

Congress, under the leadership of Senator Orrin Hatch, has intervened to protect the rights of automobile dealers to enforce the Automobile Dealers Day in Court Act.²⁸⁰ And under the leadership of Senator Chuck Grassley, Congress has assured the right of farmers to opt out of arbitration clauses written into their printed contracts with firms that buy their produce.²⁸¹ But much state and federal law is less vigorously enforced as a result of the Court's decisions.²⁸²

C. *Rewriting Rules of Evidence*

Meanwhile, the Court has also rewritten the Federal Rules of Evidence to weaken and perhaps nullify federal laws dependent for their enforcement on the use of expert opinion. District judges are to exclude expert testimony that, on the basis of their personal scientific expertise, they deem unreliable.²⁸³ Rule 702 of the Federal Rules of Evidence was amended in 2000 in an attempt to codify the Court's rulings.²⁸⁴ The admission of expert testimony under that rule is highly

280. 21st Century Department of Justice Appropriations Authorizations Act, Pub. L. No. 107-273, div. C, tit. I, § 11028, 116 Stat. 1758, 1835 (2002) (codified at 15 U.S.C. § 1226 (2006)).

281. *See* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 11005, 122 Stat. 1651, 2119 (codified as amended at 7 U.S.C. § 197c (Supp. II 2008)) (requiring any livestock or poultry contract containing an arbitration provision to give the grower a meaningful opportunity to decline to be bound by that provision).

282. *See, e.g.*, Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 and 18 U.S.C.). This statute was passed over the veto of President Clinton, who expressed concern that the bill would “have the effect of closing the courthouse door on investors who have legitimate claims.” 141 CONG. REC. 37,797 (1995).

283. *See* *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–93 (1993) (concluding that the district judge has the responsibility, under the Federal Rules of Evidence, to make a “preliminary assessment of whether the reasoning or methodology underlying the [expert’s] testimony is scientifically valid”); *see also* *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (concluding that *Daubert*’s assignment of a “gatekeeping” duty to the district court judge applies not only to scientific testimony but also to testimony based on other technical and specialized knowledge); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997) (clarifying that the trial court’s determination of the scientific validity of expert testimony is to be reviewed under an abuse of discretion standard, and holding that the appeals court’s scrutiny of the district court was overly stringent).

284. *See* FED. R. EVID. 702 advisory committee’s note to 2000 amendment (2000); *see also* *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 325 (5th Cir. 2004) (“Amended Rule 702 reflects the

discretionary and dependent on the judge's scientific competence.²⁸⁵ Review of such rulings in the courts of appeals is, to say the least, problematic,²⁸⁶ and this empowerment has contributed measurably to the rise in summary judgments dismissing plaintiffs' cases.²⁸⁷ One effect of this reform is to magnify the political consequences of the Court's efforts to diminish access to discovery.²⁸⁸

For example, the enforcement of some federal laws regulating business may depend on expert economic opinions that can be secured only from experts fully informed of the defendant's case. The Bank Merger Act,²⁸⁹ a law connecting banking and antitrust law, is a timely example of a federal law that may have been nullified by the Court's rewriting of the law of evidence to require unavailable expertise. Whether less constrained enforcement of the Act might have diminished the impact of the 2008 economic crisis is a question that may be worthy of consideration.

D. A Captured Court

Perhaps it is not an overstatement to say that the Supreme Court, as much in its reinterpretation of the Federal Arbitration Act as in its rewrite of the Civil Rules, appears to have been captured by business interests—much like many public regulatory agencies were captured, making citizens increasingly dependent on the system of effective private law enforcement that emerged from the 1934 Act

Supreme Court's decisions in *Daubert* and its progeny emphasizing the district courts' broad latitude in weighing the reliability of expert testimony for admissibility.”).

285. See Sheilah Jasanoff, *Law's Knowledge: Science for Justice in Legal Settings*, 95 AM. J. PUB. HEALTH S49, S50 (2005) (observing a “disenchantment in contemporary America with the law's capacity to resolve the manifold technical disputes of modernity”).

286. See, e.g., *Huss v. Gayden*, 585 F.3d 823, 824 (5th Cir. 2009) (per curiam) (Owen, C.J., concurring) (describing the disagreement between the panel majority and the dissents over whether the district judge had erred in excluding an expert's testimony on general, rather than specific, causation).

287. See LLOYD DIXON & BRIAN GILL, RAND INST. FOR CIVIL JUSTICE, CHANGES IN THE STANDARDS FOR ADMITTING EXPERT EVIDENCE IN FEDERAL CIVIL CASES SINCE THE *DAUBERT* DECISION 55–57 (2001) (noting an increase in summary judgments arising out of challenges to expert evidence in the wake of *Daubert*).

288. PROJECT ON SCIENTIFIC KNOWLEDGE & PUB. POLICY, *DAUBERT: THE MOST INFLUENTIAL SUPREME COURT RULING YOU'VE NEVER HEARD OF* 3 (2003) (“In the aftermath of *Daubert*, not only are many legitimate scientists and their work being barred from the courtroom, but plaintiffs are being denied their day in court, unfairly in our view.”).

289. Act of May 13, 1960, Pub. L. No. 86-463, 74 Stat. 129, amended by Act of Feb. 21, 1966, Pub. L. No. 89-356, 80 Stat. 7.

and its political premises.²⁹⁰ I believe it is fair to say that the Roberts Court since 2007 has set for itself the political goals advanced a quarter century earlier by Vice President Quayle's Commission without noting that the Commission was addressing its deregulatory recommendations to Congress, not to the Court. And it is not an overstatement to say that the Court has in these decisions manifested judicial activism of just the sort that conservative politicians have so vigorously decried.²⁹¹ It might be said that the Roberts Court appears as the Quayle Commission on Competitiveness in robes.

X. PRESCRIPTIONS

The Institute for the Advancement of the American Legal System, a think tank established in 2006, has chimed in with a proposal of *Civil Caseflow Management Guidelines*²⁹² and a set of proposed *Pilot Project Rules* to which the name of the American College of Trial Lawyers is also attached.²⁹³ Veteran litigators J. Douglas Richards and John Vail have expressed skepticism, making

290. See Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, at 38, 42. Capture was further confirmed by *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), which held that corporations have a First Amendment right to fund political campaigns. *Id.* at 898. As Timothy Kuhner observed in 2007, the separation of church and state was the primary aim of the First Amendment; yet the Court now invokes that text to forbid laws striving to separate business and state. See Timothy K. Kuhner, *The Separation of Business and State*, 95 CALIF. L. REV. 2353, 2374 (2007) ("Formal separation limits the amount of control religious authorities can exercise. The absence of formal separation with regard to monetary influence is damning in this precise regard."); see also Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 209 ("The current Court is creating an ever-greater regulation-remedy gap. It has left Congress free to regulate a wide range of subjects, but it is engaged in a form of court stripping that reduces the possibilities for judicial enforcement of statutory commands.").

291. See REPUBLICAN NAT'L COMM., 2008 REPUBLICAN PLATFORM 19 (2008), available at <http://www.gop.com/2008Platform/2008platform.pdf> ("Judicial activism is a grave threat to the rule of law because unaccountable federal judges are usurping democracy, ignoring the Constitution and its separation of powers, and imposing their personal opinions upon the public."). This may be a misuse of the term "judicial activism." See Siegel, *supra* note 222, at 556 (suggesting that "the rhetoric of judicial activism is deployed to condemn particular views on particular issues and not to express a genuine commitment to judicial deference or to the ideal of fidelity to law"); cf. David E. Bernstein, *Liberals, Conservatives, and Individual Rights*, CATO INST. (June 27, 2008), http://www.cato.org/pub_display.php?pub_id=9511 (citing examples of conservative support for invalidating regulations and arguing that a commitment to individual civil liberties is not monopolized by any particular ideological bloc on the Court).

292. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASEFLOW MANAGEMENT GUIDELINES (2009).

293. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. & AM. COLL. OF TRIAL LAWYERS, PILOT PROJECT RULES (2009).

the not-groundless claim that the facts on the ground do not justify reforms on the scale proposed by the Institute.²⁹⁴

I agree with Richards and Vail that the case has not been made for radical departure from the scheme established in 1938. To be sure, times have changed. But the proposed Pilot Project Rules, like the decisions of the Court in *Twombly* and *Iqbal*, seem to be derived not from observable reality but from a political ideology that is resistant to private enforcement of public law and therefore favored by the Chamber of Commerce. Indeed, there was nothing in either *Twombly* or *Iqbal* that had not been considered and rejected repeatedly by the Advisory Committee, among others.²⁹⁵

Professor Arthur Miller has thoughtfully prescribed diverse actions for the Advisory Committee to consider as possible revivals of the Civil Rules.²⁹⁶ But the present rulemaking system cannot alone correct what the Supreme Court has done to impair the effective enforcement of the substantive laws made by Congress or the states. Given the role of the Court in the rulemaking legislative process as established by the 1934 Act, there is simply not much that the Advisory Committee or the Judicial Conference can reasonably be expected to do. To restate the law of pleading as expressed in *Twombly* and *Iqbal* would require a repudiation of the premises of the Rules Enabling Act of 1934 and the antecedent thoughts on procedural law reform dating from Bentham, Field, and Pound.

294. J. Douglas Richards & John Vail, *A Misguided Mission to Revamp the Rules*, TRIAL, Nov. 2009, at 52, 52–54.

295. Steven Burbank observed,

Nor do I think it was fortuitous that the Court proceeded by judicial decision rather than by remitting the issues to the Enabling Act process. As the head of the latter the Chief Justice was well aware that the Civil Rules Committee had raised and abandoned the possibility of amending the pleading rules a number of times, including in the recent past. Moreover, one of the reasons for the committee's serial inaction—that any amendment tightening pleading would be politically controversial and thus likely to arouse strong opposition in Congress—can only have encouraged the Court to proceed as it did, particularly with a Democratic Congress.

It is precisely because these decisions represent an attempted power grab by the Court in direct contravention of the process prescribed by Congress that I have advocated legislation that would return federal pleading law to the status quo ante until such time as amendments to the Federal Rules are proposed through the Enabling Act process, subject to review by Congress.

Steven Burbank, Remarks to the Constitution Society (Feb. 24, 2010) (on file with the *Duke Law Journal*).

296. Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 103–27 (2010).

It is therefore past time for Congress to address the issues presented to the Advisory Committee in 1985 and now elevated to urgency by the Court's holding in *Iqbal*. I therefore offer my unqualified endorsement to the Notice Pleading Restoration Act of 2009²⁹⁷ as proposed by Senator Specter and others. Or, better, to Professor Stephen Burbank's proposal.²⁹⁸ Or the Open Access Act proposed by Representative Jerrold Nadler.²⁹⁹ Or possibly Professor Martin Redish's more radical proposal to have the Judicial Conference report directly to Congress, with such advice as the Court might wish to contribute.³⁰⁰ Surely Redish is correct that the responsibility for making nontranssubstantive law is constitutionally vested in Congress, not the Court. If, for example, there is to be a different standard for summary judgment or motions for judgment on the pleadings applicable to antitrust cases, the institution to promulgate such a law was and is Congress, not the Court.

One is moved to be cautious in engaging Congress in the politics of procedural rulemaking. Alas, in another of its activist ventures as the champion of business interests, the Court has assured the right of those with money to dominate the election of legislators at all levels of government.³⁰¹ I do not suppose that Congressman Kastenmeier was a victim of generous business contributions to the campaign of his adversary, but it would be no surprise to learn that some congresspersons in 2010 would take the risk of well-funded opposition into account before considering rules of civil procedure that might enhance the ability of citizens to enforce laws regulating business.

Perhaps the Advisory Committee might be summoned to serve Congress as a consultant in a search for an enactment that might

297. S. 1504, 111th Cong. (2009).

298. *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 106 (2009) (statement of Stephen Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania) (proposing a draft substitute amendment "to implement an approach that would return the law governing pleading and pleading motions to the status quo before *Twombly* and *Iqbal*").

299. H.R. 4115, 111th Cong. (2009); see also Cecelia M. Assam, *House Panel Delves Deeper into Access to Courts Question*, 78 U.S.L.W. 2366 (2009) (discussing House hearings on the bill).

300. MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 18, 62–85 (2009).

301. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898 (2010) (holding that the congressional "prohibition on corporate independent expenditures" found at 2 U.S.C. § 441(b) constituted "a ban on speech" in violation of the First Amendment); see also *supra* note 290.

bring the Court back to the mission of enforcing the rights of citizens, as expressed by generations of law reformers and embodied in the Rules Enabling Act of 1934, without arousing great anxieties of great funders of political campaigns. Might Congress, for example, empower the Court to certify to the Judicial Conference questions about procedural rules and their possible need for reconsideration or revision in a transparent and representative process? Would such empowerment, by providing the Court with a self-effacing method of addressing the politics of civil procedure, help the Court to find its way back home to an appropriately modest role in the constitutional scheme? It might be worth a try. Whatever the best prescription, Congress must act or many of its laws will go down the drain of weak enforcement that the Court has opened.